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Williams

AN INTRODUCTION

THE PRINCIPLES AND PRACTICE

OF

PLEADING

IN CIVIL ACTIONS IN

The Superior Courts of Law at Westminster.

EMBRACING

AN OUTLINE OF THE WHOLE PROCEEDINGS IN
AN ACTION AT LAW.

TOGETHER WITH

THE REGULE GENERALES OF PRACTICE AND PLEADING OF
HIL. & TRIN. 1853, MICH. 1854 & MICH. 1855.

BY

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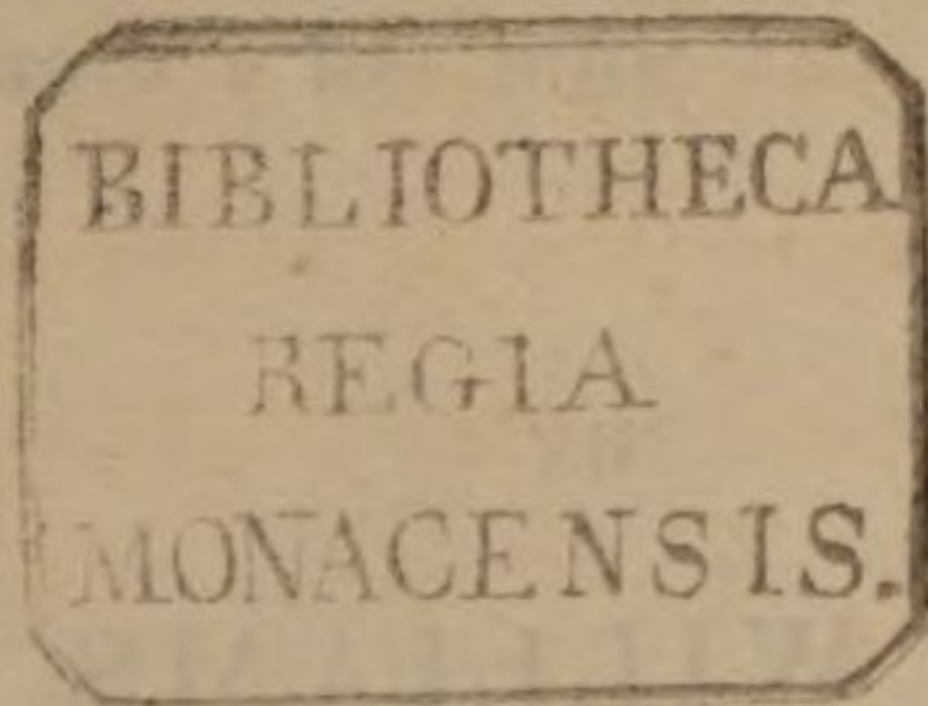
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THE PRACTICE OF THE COURT OF CHANCERY

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THE system of Pleading in the Superior Courts of Law having, in many important respects, been newly moulded within the last few years, it has been thought that a new work upon the *Principles and Practice of Pleading* might prove acceptable to Students and also to the Profession; a treatise upon the entire subject has accordingly been undertaken.

The present volume, embracing the introductory division of the work, is offered to the Student in a distinct form, and complete in itself. The remaining portion, which has been some time in course of preparation, will be issued as speedily as due regard to accuracy and the difficulty of the task will permit.

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Kenn's Branch Work,
New York, 1853.

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CHAPTER XIX.

REGULÆ GENERALES, TRINITY TERM, 1853—THE RULES
OF PLEADING,
AND THE RULES OF MICHAELMAS VACATION, 1854.

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ADDENDA ET CORRIGENDA.

PAGE

- 13, note ^f, for "decision" read "division."
- 28, line 31, for "1854" read "1852."
- 29, line 9, after "parties," add, "to any deed or other instrument in writing."
- 55, line 24, for "bonds," read "deeds poll."
- 82, line 27, strike out the words, "at once," and add to note ^t, "see Final and Interlocutory Judgment, p. 200 *infra*."
- 89, line 17, add a note, "In replevin, the names of the alternate pleadings are in general different to those in an ordinary action. If the defendant justifies the taking, for example, as a distress for rent arrear, he is said to *avow* or make *cognizance*, the former when he justifies in his own right, the latter as agent for another; after an *avowry* or *cognizance*, the plaintiff's next pleading is his *plea in bar*, which is followed by the defendant's replication and so on; and when the pleadings take this course, the defendant's position is analogous to that of a plaintiff in an ordinary action. If, however, the defendant denies the taking and pleads *non cepit*, the pleadings take the ordinary course."
- 99, several counts, add, "any number and variety of distinct causes of action, between the same persons and in the same rights, may be joined together in the same declaration. Provided, that, if inconvenience will be likely to arise in any case from so doing, the Court or a Judge may order them to be disjoined; and provided, that ejectment and replevin shall not be joined together, nor with any other action."
- 115, add to note ^f, "This plea, which is called the *parol demurrer*, is no longer in use, having been abolished by 11 Geo. IV. & 1 Will. IV. c. 47, s. 10. See *Price v. Carver*, 3 My. & Cr. 157."
- 125, to word "infant," add, as a note, the same as to p. 115, above.
- 163, line 10, add a note, "It has been assumed that there has been but one issue to be tried: where there are several issues or a divisible issue, it follows of necessity that there may be verdicts for both parties upon different points, or a verdict be taken as to one or more, and the jury discharged as to the residue. See pp. 263, 264, *infra*."
- 193, line 25, for "rule," read "judgment."

STATUTES OF LIMITATIONS.

NOTE to Page 70.

There is a wide difference between the *extension of the period of limitation*, when there is an acknowledgment or part payment, in the cases within the statutes of 3 & 4 Will. IV., chapters 27 and 42, and the *taking the case out of the statute* in ordinary cases. In the former the action is founded upon the *original right of action*, and should the defendant plead the Statute of Limitations, the plaintiff will reply the acknowledgment or part payment specially; whereas in the latter, the action is founded on the *new obligation*, and should the defendant plead that the action did not accrue within six years, the plaintiff in his replication will allege that it did.

It has been impossible to do more in the text than merely refer to these statutes; the very words of the statutes should however be carefully studied in connection with the cases; these will be found collected in 3 Chitty's Statutes, 57, and Chitty on Contracts, 705.

AN
 ELEMENTARY TREATISE
 UPON
 Pleading and Practice at Law.

CHAPTER I.

ORIGIN OF THE SUPERIOR COURTS AND THEIR ANCIENT JURISDICTION.

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<i>Curia Regis</i>	1	<i>Court of King's Bench</i> ..	3
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<i>Curia Regis established as a Court of Justice only</i> ..	ib.	<i>Jurisdiction of the Court of Exchequer</i>	5
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THE Judicial system in England continued in a very imperfect state of organization for some time after the Norman Conquest. The County Courts, Hundred-motes, Borough-motes, and the Manor Courts, the Courts Baron and the Hall-motes of the King and Norman lords constituted the regular tribunals for the administration of justice throughout the country in matters of ordinary importance ; and, when occasion required it, extraordinary Courts were convened, sometimes by the assembly of the Judges of two or more Courts, at others by the appointment of a Judge for the occasion by a special commission from the Sovereign. In these Courts there was scarcely any regular procedure, the plaintiff sum-

Judicial system in ancient times.

.. B

moned his opponent, and stated his complaint in whatever manner he chose.^a

Curia Regis.

The *Curia Regis* appears at the time of the Conqueror to have united under one name the Supreme Court of Justice with the Legislative Council of the nation. The judicial functions appearing, in fact, to have been discharged by a portion only of the whole assembly, in the nature of a committee selected for the purpose. The *Curia Regis*, as its name implies, was presided over by the king, and the place of assembly was called the *Aula Regia*.

Chief Justiciary.

A high officer called the *Chief Justiciary* was appointed to preside over the judicial department and to superintend all pleas or suits, civil and criminal.

High Chancellor.

The office of High Chancellor had been continued from the Anglo-Saxon time. This great officer had the care of the Rolls, upon which were entered the royal grants, charters, and writs. He had the custody of the royal seal, and to him was assigned the duty of authenticating the royal grants, charters, and writs, by affixing thereto the great seal.

Court of Exchequer.

The Court of Exchequer had also been fully established as an independent Court for the transaction of all business relating to the royal revenue. The Chief Justiciary, the Chancellor of the Exchequer, and such of the king's barons and ecclesiastics as he selected, attended to administer the law: the Chief Justiciary presiding.

The judicial branch of the *Curia Regis* had universal jurisdiction, except in such matters as came within the province of the Court of Exchequer.

In the reign of Hen. I., the *Curia Regis* had become the regular Court of Appeal from all the Courts of inferior jurisdiction.^b

These were the ordinary and regular tribunals for the administration of justice. In these the law of the land, or, as it is sometimes called, the *common law*, was ad-

^a See 1 Spence, Eq. Juris. Rise, 98, 181; Broom's Comm. 23. pp. 58, 62; Sir F. Palgrave's ^b Leges Hen. I. c. 57, s. 8.

ministered. In addition to these, the sovereign had, from the earliest times, exercised an extraordinary or *equitable jurisdiction* for mitigating the severity of the positive law.^c This jurisdiction was afterwards delegated to the High Chancellor, and formed the germ of the equitable jurisdiction of the Court of Chancery.^d William the Conqueror also occasionally commissioned certain of his justices to proceed through the provinces for the purpose of entertaining pleas, that otherwise from their importance would have been brought before the *Curia Regis*. This was a step towards the subsequent institution of the circuits.

Equitable jurisdiction of sovereign.

The germ of the Court of Chancery.

In the reign of Hen. II., the *Curia Regis* was established as a Court for the transaction of judicial business only. The Legislative Council constituted from this time a wholly distinct assembly.

Curia Regis made a distinct court.

It had always been the practice for the *Curia Regis* to accompany the king, and to be held wherever he might chance for the time to be. This uncertainty as to its locality, and the great expense thereby entailed upon suitors, gave rise to much complaint. To remedy this, it was enacted by *Magna Charta*, that common pleas or pleas between subject and subject, as distinguished from pleas of the crown or criminal pleas, should not follow the king; and ultimately, in order effectually to carry out the provisions of this enactment, a separate Court, called the *Court of Common Pleas*, was established and permanently fixed at Westminster, where it remains to this day. After the removal of the Common Pleas from the *Curia Regis*, the latter acquired the name of the *Court of King's Bench*. The office of Chief Justiciary was also afterwards abolished by Edw. I., and that of Chief Justice of England at the head of the Court of King's Bench substituted for it.

Origin and establishment of the Court of Common Pleas.

Court of King's Bench.

Chief Justice of England.

By this time the three Superior Courts of Law at Westminster, namely, the Queen's Bench, Exchequer,

^c Leges Burgund. 52.

^d 1 Spence, 77.

and Common Pleas were fully established, though, as will be hereafter seen, with a different distribution of jurisdiction to that prevailing at the present time.

Ancient jurisdiction of the Queen's Bench.

The jurisdiction of the Queen's Bench was twofold, criminal and civil, the former extended to all pleas of the crown or criminal pleas, and the latter to all common pleas partaking of a criminal nature or accompanied with violence or fraud, and thus it had cognizance of all actions of trespass and ejectment, and for forgery of deeds, champerty, maintenance of suit, conspiracy and deceit; and also the action of replevin and the action of *quare impedit* when at the suit of the crown.^e This Court had cognizance also of all personal actions whatsoever at the suit of any of the officers of the Court, or in which the defendant was an officer of the Court, or in the custody of the marshal.^f This Court was also the Court of Appeal from all the Courts of ordinary jurisdiction, excluding the Court of Exchequer, but including the Court of Common Pleas.

Certiorari.

It was its prerogative also to keep every inferior Court within the limits of its jurisdiction, commanding such Court by *certiorari*, if it was a *Court of Record*, to send up before itself the record of the proceedings; and in all cases it might stay the proceedings below by writ of *prohibition*.

Prohibition.

Quo warranto.
Mandamus.

By *quo warranto* and *mandamus* it exercised a most extensive jurisdiction over all civil corporations, magistrates, public officers and others, commanding them in all cases where there was no other remedy to do what their duty required.^g

Of the Common Pleas.

The jurisdiction of the Court of Common Pleas was limited to suits between subject and subject. It had exclusive jurisdiction in all *real* and *mixed* actions, except *quare impedit* in the case already mentioned, in which the Queen's Bench had also jurisdiction, and

^e Com. Dig. Pleader, 3 I.; Co. Inst. 71.

^f See "Ejectment," *infra*.

^g 3 Black. Com. 41, 42.

also excepting *ejectment*, which was originally a personal action, and in which the Queen's Bench had concurrent jurisdiction and the Exchequer also in certain exceptional cases.

The Court of Exchequer differed greatly from the others in its constitution and jurisdiction. It consisted of two divisions. *The receipt of the Exchequer*, which managed the royal revenue and the judicial branch of the Court, which was again divided into two sides, namely, an equity and a law side. The Court of Equity was held before the Lord Treasurer, the Chancellor of the Exchequer, and the Barons of the Exchequer, and its business was to call the king's debtors to account by bill filed by the Attorney-General, and to recover all lands and goods belonging to the crown: all debtors of the crown, as well as all officers of the Court, had also the privilege of seeking relief in this Court. The Court of Law in the Exchequer originated in a privilege which was given to all debtors of the crown to sue in that Court in all manner of personal actions including *ejectment*. This privilege was also extended to the officers of the Court. The jurisdiction of this Court in the case of debtors to the Crown was given for the purpose of promoting the due and punctual return of the royal revenue,^h the suitor alleging, upon proceeding in that Court, that he was a debtor to the crown and had sustained damage from the intended defendant, "*quo minus sufficiens, &c.*" by which he was the less able to pay the king, upon which, in the case of his suing by action, he was furnished with the regular process, called a writ of *quo minus*, for compelling the defendant to appear and answer his complaint.

Of the Exchequer.

Two divisions.

Revenue side.

Judicial side.

The latter divided into a Court of Law and a Court of Equity.

Writ of quo minus.

Thus, originally, the three Courts differed widely from one another in the nature of their business and the extent of their jurisdiction. In course of time, however, the Courts of Queen's Bench and Exchequer, by the inven-

^h See 10 Edw. I. c. 11.

tion of certain processes, and the encouragement of certain fictions of law, gradually extended their jurisdiction into the province of the Common Pleas, until all three Courts came to have practically concurrent jurisdiction in all personal actions and in *ejectment*, but with different modes of proceeding; until at length the uniformity of Process Act recognized and confirmed this usurped jurisdiction, and made the mode of procedure uniform in all the Courts.

CHAPTER II.

THE ANCIENT MODES OF PROCEDURE.

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<i>Commencement of Action by Original and by Bill</i>	<i>ib.</i>	<i>Origin of Actions on the Case</i>	13
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It is supposed, that, in ancient times, the Royal Courts were open to suitors at all times of the year. Afterwards, for reasons that have been variously stated, and which are wholly unimportant, the business of the Courts was *limited* to certain portions of the year, called from this circumstance the *terms*; the intervals between the terms being called the *vacations*. The terms and vacations.

It is said by Blackstone, that with respect to some of the terms, or more correctly, the vacations, they were instituted by the influence of the ecclesiastics, for the purpose of preventing the desecration of certain holy periods by the transaction of legal proceedings, and that the Long, or Summer Vacation, was established on account of the harvest.

Legal proceedings have, however, for a long time ceased to be confined exclusively to the terms. Most proceedings can now be carried on at any time of the year, except from the 10th of August to the 24th of October, during which time the progress of a contested suit is suspended.^a The division of the legal calendar

^a Writs may be issued and served, judgment signed, and execution issued at any time of the year.

The terms and vacations. into terms and vacations is still, however, maintained, although the reasons for which it is supposed to have been made have long ago vanished. It has been allowed to remain as being a convenient division of the calendar with which lawyers had become familiar, attended with no inconvenience to any one, and no abuse that was inseparable from the mere division itself.

The terms are four in number. Their duration is fixed by statute. *Michaelmas* term begins on the 2nd and ends on the 22nd of November. *Hilary* begins on the 11th and ends on the 31st of January. *Easter* begins on the 15th of April and ends on the 8th of May. *Trinity* begins on the 22nd of May and ends on the 12th of June. When however any days intervening between the Thursday before and the Wednesday after Easter day fall within Easter term, then the term is to be suspended for these days, and is to be prolonged proportionally at the end, to make up the lost days, and Trinity term is, in this case, to be correspondingly postponed.

Besides the time from the 10th of August to the 24th of October, there are also certain days throughout the year which are made complete holidays, and on which no proceedings can be taken; these are Sunday, Christmas Day and the three days following, and Good Friday, Easter Eve, Easter Monday and Tuesday, the Queen's birthday and accession day, and Whit Monday and Tuesday.^a

Jurisdiction of Courts divided into formal and summary. The jurisdiction of each of the Courts of Law appears always to have been considered as divisible into its *Formal* jurisdiction and its *Summary* or *Equitable* jurisdiction, the former being that by virtue of which the formal or regular and matter-of-course proceedings in an action were carried on, the latter being the discretionary power

^a As to the mode of computing time, see Rules of Practice, H. T. 1853, *infra*.

exercised by the Court over its own proceedings and its officers, and also in other matters, in order to prevent abuse of its process or hardship arising from its own rules and other like purposes.^b

In like manner, there have always been, from the earliest time, two modes of proceeding to put the machinery of the Courts in motion. First by *action*, secondly by *motion*. Two modes of procedure, action and motion.

The motion is an application made orally to the Court, supported by *affidavit* of the facts upon which it is founded, *praying* the Court to command or *rule* some matter to be done. It is by *motion* and *rule* that the summary jurisdiction of the Court is made available to the suitor, although this proceeding is not confined to the equitable jurisdiction of the Court.^c Motion and rule.

It is by *action* that the suitor in general *claims* the *right* given him by the law, and for this purpose puts in motion the formal machinery of the Court, and obtains the judgment which the law has provided for such cases. Action and judgment.

In ancient times, no action could, as a rule, be brought in any of the Courts without the authority of the King's writ, or, as it was called, the *original* writ. There were, however, certain exceptional cases, including the cases in which certain persons were already privileged to sue; such as the privilege of debtors of the crown to sue in the Court of Exchequer, and of the officers of each Court to sue in their own Court, and including also the cases of intended defendants who were already within the authority of the Court, as the prisoners of the Court of Queen's Bench, and the officers of all the Courts: in all the above cases the King's writ was unnecessary, and the action was commenced by *bill* or declaration in the manner presently mentioned. Actions commenced by original or by bill.

The *Original Writ* was a royal mandate issued upon the application of the suitor to the sheriff of the county The original.

^b See "Equitable Jurisdiction of Court," *infra*.

^c See "Motion and Rule," *infra*.

where the grievance was alleged to have occurred, directing him to command the defendant to redress the grievance, a general statement of which was set forth, and in default of his doing so, to summon him to appear in a certain one of the Courts to show wherefore he would not do so. There was also a further direction to *return* the writ by a certain day to the said Court, with a statement of how he had executed it. This writ, upon its return to the Court, was the authority that put its machinery in motion, and authorized the plaintiff to issue the regular processes, and to advance with the regular proceedings in the action. The writ was never made returnable into the Exchequer.

Granted by the King.

Afterwards by the Chancellor.

The præcipe.

In early times, the writ was granted by the King himself, with the advice of his council, and especially of the High Chancellor, who was his confidential minister and adviser upon all matters relating to the administration of the law. The application for the writ was founded upon a general statement of the nature of the grievance, which, in after times, acquired the name of the *Præcipe*, whereupon the writ was granted or refused according to the case.

Every writ was based upon some *regula juris*, or principle of law, upon which the plaintiff's claim was required to be founded, and the facts were set forth with only sufficient particularity to bring the case within such principle of law.

Register of writs.

Every writ that was thus issued was entered upon a *Register* kept for that purpose in the office of the High Chancellor. This register, for reasons that will presently appear, came to be regarded as one of the foundations of the law of the land.

The writs issued by the Clerks of the Chancery.

The authority of issuing the writs was, at an early period, delegated to the Chancellor, who was assisted in the duty by certain clerks, called *preceptores*, or masters. In course of time, a distinct office was established in chancery for the issue of the writs, and the whole

duty had devolved upon certain *Clerks of the Chancery*; of these it appears that, at an early time, there were two classes, upon one of which devolved the duty of drawing up the writs that were not strictly of course, and upon the other the duty of drawing up and issuing such writs as were *de cursu*, as of course, and who, from this circumstance, afterwards acquired the name of *cursitors*. The Cursitors. This establishment was called the *Officina brevium*; it Officina brevium. was a department of the *Officina justiciæ*, or the common law branch of Chancery.

When the issuing the writs became thus entirely the business of the clerks, they confined themselves to the issue of such writs as there were precedents of to be found on the register, and any suitor claiming redress for a grievance to which none of the old writs applied could only obtain it by application to the King in council for a writ applicable to his case, the new writ so obtained being added to the register, and serving as a precedent for the future; and thus, by a mere accidental circumstance, the register of writs became the principal foundation of the law.

If, upon the return of the *original*, the defendant neither made redress nor appeared to the action, his compliance was enforced by certain writs of *process*. Process. A judicial writ. These writs issued from the Court, to which the original had been returned, and were *tested* or attested in the name of the Chief Judge of the Court, and for this reason they were called *judicial* writs. This process was sometimes called *original* process, and, as such, was distinguished from *mesne* process, which issued in the course of the suit; however, the term *mesne process* was sometimes applied to all process both at the commencement and during the continuance of the suit, as distinguished from *final process* or execution. Original and mesne process distinguished from final process.

The writ of process was also a royal mandate to the sheriff directing him to take certain steps to secure the appearance of the defendant in Court, such as distraining Nature of process.

his goods or arresting his person, as the case might be.^d It became the regular practice in course of time to issue the process in the first instance, and merely to leave the *præcipe* for the original, and not to issue the latter at all in fact, unless it became necessary in order to support the validity of the proceedings.

The next proceeding, after the appearance of the defendant, was the count or declaration of the plaintiff, which was the formal statement of the cause of action, and which was, in fact, merely an expansion and development of the writ.

The original writs, and consequently the causes of action of which they were the foundation, were divided into three kinds, *real*, *personal* and *mixed*.

Division of
actions.

Real.

Personal.

Mixed.

Real actions were such as were brought for the specific recovery of real property. Personal actions included all actions brought for the recovery of money or other personal property, or for personal compensation by way of *damages* for a breach of contract, or for an injury either to the property or the person. Mixed actions were such as united a claim for personal compensation by way of damages with a claim for the specific recovery of real property.

Real and
mixed actions.

The only real and mixed actions now remaining are *Right of Dower*, *Dower unde nihil habet*, *Quare impedit* and *Ejectment*,^e sixty-two having been abolished by the statute 3 & 4 Will. IV. c. 27, s. 36.

Personal ac-
tions.

Personal actions were less numerous in ancient times than those of the real and mixed kind. The principal of these originally in use were *Account*, *Annuity*, *Covenant*, *Debt*, *Detinue* and *Trespass*, and some others that have long ago fallen into disuse. Account was an action for compensation for not rendering an account. Annuity for the nonpayment of an annuity, which action has become

Account.

Annuity.

^d 3 Black. Com. 279; see also
"Arrest on Mesne Process,"
infra.

^e As to these actions, see "Di-
vision of Actions," *infra*.

almost obsolete by reason of the practice of introducing into annuity deeds a covenant to pay, upon which an action of covenant might be brought. Covenant was an action for compensation in *damages* for the breach of a contract by deed. Debt was for the *recovery* of a fixed or *certain sum* of money, payable either by virtue of a *statute*, or of matter of *record*, or by a *contract*, whether by *deed* or by *parol*. Detinue was an action for the recovery of specific goods and chattels improperly withheld. The action of trespass lay for an injury either to the person, or to real or personal property, by the *direct* act of the wrongdoer.^f Replevin also was another action which was entertained in these Courts, though always commenced in an inferior Court. This action lay for a *wrongful taking* of goods and chattels.^g

Covenant.

Debt.

Detinue.

Trespass.

Replevin.

The writ, as before observed, was the authority for the action and all the proceedings therein, if therefore it turned out that the cause of complaint was not strictly such as was contemplated by the writ, the plaintiff necessarily failed, for the Court had no power to allow a departure from the writ. This, taken in conjunction with the closeness with which the clerks of the Chancery confined themselves to the old writs on the registrar and the construction put upon them by the Courts, worked great hardship, and frequently a failure of justice when parties were unable to submit to the expense and delay attending an application to the king in council for a new writ.

Origin of the actions on the case.

To remedy the above evil, it was enacted by the statute of Westminster the second (13 Edw. I. st. 1), c. 24, "*That whensoever from henceforth it shall fortune in Chancery that in one case a writ is found, and in like case falling under like law, and requiring the like remedy, is found none, the Clerks of the Chancery shall agree in making*

Actions on the case.

Stat. of Westminster. 2,
13 Edw. I. st. 1.

^f For a fuller account of these actions, see decision of actions below.

^g This action may now be commenced in a superior court. See "Replevin," *infra*.

Actions on case. *the writ, or the plaintiff may adjourn it into the next Parliament, where, by consent of men learned in the law, a writ shall be made, lest it happen hereafter that the Court should long time fail to administer justice unto complainants."*

Case. By the authority of this enactment certain new writs were framed by the Clerks in Chancery in analogy to some of the old ones, but modified so as to be applicable to the difference in the nature of the novel case. These new actions were for this reason called *actions on the case*. In these actions, as observed by Lord Coke, 10 Rep. 130, "A man may declare his case as it really is, and he shall have a remedy for such part as legally requires a remedy." Two classes of these writs were founded upon the old writs of trespass and detinue, and gave rise, the former to the action of trespass on the case, or, as they are particularly called, *case*; and the latter to the action of detinue on the case or *trover*.

Trover. *Trespass on the case* applied to claims for compensation in damages for any *injury*, either to the real or personal property, or to the individual in his person or reputation, resulting as the consequence of, but not being the direct act of, the wrongdoer. *Trover* applied to cases in which compensation in *damages* was sought, for the wrongful conversion by the defendant to his own use, or the wrongfully depriving the plaintiff of the goods and chattels of the plaintiff.

Assumpsit. The action of *trespass on the case* was from the first very liberally construed by the Court of Queen's Bench, and was considered to apply not only to all cases of *malfeasance*, or the doing that which one has no right to do, but also to all cases of *misfeasance*, or the doing improperly or defectively what one has contracted to do;¹ it was thus made to include many cases arising strictly *ex contractu*, which that Court by its *original* constitution had no jurisdiction to entertain. After a time the action

¹ 2 Fleta, c. 1, s. 1; see *Assumpsit*, *infra*.

was even stretched a point further, and was held to include cases of mere *nonfeazance*, or the non-performance of a contract.^k This was the origin of the action of *assumpsit*,^l the first attempt to introduce which was in the reign of Hen. VII.; it did not, however, come into regular use until the reign of Elizabeth, when it came to be regarded as wholly distinct from the other actions of *trespass on the case*, and it came to be called an *action on the case on promises*, and to be applicable to all cases of claims for unliquidated *damages* for the breach of a simple contract.

Sometimes it is a matter of great nicety to determine to which of certain two classes of actions a particular case arising in practice most properly belongs, for neither in legal science, any more than in any other, has any ingenuity been able to construct a classification that shall be secure against meeting, amongst the variety of actual facts, cases which fall completely across the confines of the divisions. When, therefore, it was requisite to place these cases into one class or another, the choice was sometimes necessarily determined by the most trivial and artificial distinctions.^m This has contributed as much as anything to the many unjust reproaches of which the science of pleading has popularly been made the object. In former days it was absolutely necessary that the pleader should be thoroughly conversant with the division of actions, as the form of action had to be stated in the writ, and had to be followed in the pleadings; and if it happened that the action did not properly belong to that class, it failed. At the present day, however, as we shall hereafter see, this knowledge is not of the same degree of importance, since it is no longer necessary to state the form of action in the writ, nor in general to state the cause of action in any particular form.

Classification of actions necessarily arbitrary.

Knowledge of the division of actions less important at present than formerly.

^k 4 Reeves, 171.

^l Year Book, Hen. VII. fol. 41.

^m See the case of *Scott* and

Sheppard, 1 Smith's Lead. Cas. and Notes.

Procedure by
bill.

Cases to which
it was ap-
plicable.

The procedure by *bill* or declaration was originally an exceptional mode of commencing an action. It was applicable to those cases already referred to in which a party was authorized to sue in a particular Court by reason of a privilege, or where a party was liable to be sued in any particular Court by reason of his being already within its authority. In these cases the Courts had jurisdiction by law to entertain the suit without the particular authority of the king's writ. They were as follows, the officers of all the Courts had the privilege of suing in their own Courts, and were also liable to be sued therein, without the authority of an original writ. In the same manner debtors of the crown had the privilege of suing in the Court of Exchequer. And, lastly, any one in the custody of the marshal of the Court of Queen's Bench might be sued in that Court. This privilege extended in no case to any but personal actions and ejectment.

Mode of pro-
ceeding.

The procedure was as follows. When it was available by reason of privilege in the plaintiff, he commenced the action by the issue of a judicial *writ of process* out of the Court in which he sued, in order to procure the appearance of the defendant, and upon his appearance filed or delivered, as the case might be, his *bill* or declaration, which, as before mentioned, was the formal statement of his cause of action. Where this proceeding was applicable, by reason of the defendant being already within the authority of the Court, the plaintiff proceeded at once, by filing or *exhibiting* his bill against him amongst the records of the Court.

In all these cases the bill was required to be conformable to some form of action for which there was an original writ.

CHAPTER III.

PROGRESS FROM THE ANCIENT TO THE MODERN JURIS-
DICTION AND PROCEDURE OF THE COURTS.

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THE three Superior Courts, as observed in a former chapter, had originally each its own peculiar province, beyond which it had no jurisdiction, and in particular it will be remembered, that the cognizance of all common pleas or suits between subject and subject belonged exclusively to the Court of Common Pleas, with certain very limited exceptions. In course of time, however, the Courts of Queen's Bench and Exchequer encroached upon the province of the Common Pleas, and acquired concurrent jurisdiction with that Court in all personal actions and in ejectment. This was accomplished in the following way.

Amongst the exceptions in which the Courts of Queen's Bench and Exchequer had cognizance of common pleas were the two following, namely, first, where any one was in the custody of the marshal of the Court of Queen's Bench he might be sued in that Court in all manner of personal actions whatsoever. Secondly, a

Jurisdiction of each Court originally distinct.

Queen's Bench and Exchequer encroach upon the Common Pleas.

debtor of the crown had the privilege of proceeding in the Exchequer in all personal actions, including ejectment, upon the suggestion of his being so indebted, and that he had sustained damage from the defendant *quo minus, &c.*^a

By means of legal fictions.

By the adoption of certain legal fictions, these Courts stretched the above exceptions in such a manner that all personal actions in all cases whatsoever were capable of being brought within them.

In Queen's Bench defendant fictitiously made a prisoner of the Court.

In the Queen's Bench, a plaintiff desiring to sue for a cause of action over which that Court had no jurisdiction by *original*, caused the intended defendant to be placed in the custody of the marshal of the Court upon a fictitious charge of trespass, which, being regarded as of a criminal nature in these early times, was ground of arrest,^b and when the defendant was thus within the jurisdiction, he proceeded against him for the true cause of complaint, at the same time abandoning the charge of trespass, which, in fact, had been entirely fictitious, and resorted to only in order to get the defendant within the jurisdiction of the Court. This fictitious proceeding was confirmed and supported by the Court, and defendants, in such case, compelled to answer the true cause of complaint. At the same time a rule was established that in such cases the defendant could not be placed in actual custody unless the real cause of complaint authorized it, and when it did not, the custody was such only in contemplation of law, and there was no actual imprisonment.

In Exchequer plaintiff made a fictitious suggestion of privilege as a debtor to the Crown.

In the Exchequer, any plaintiff, upon the suggestion that he was a debtor to the king, and that he had sustained damage from the defendant, *quo minus, &c.*, was allowed to sue in that Court, and the defendant was not permitted to deny the suggestion of privilege, but was compelled to answer the action.

13 Car. II. c. 2.

It was attempted by the statute 13 Car. II., c. 2, to

^a See p. 5, *supra*.

^b See "Arrest on *mesne Process*," *infra*.

deprive the Court of Queen's Bench of this acquired jurisdiction in all important cases. It was enacted by that statute, that in all cases in that Court, in which the defendant was held to bail for more than 40*l.*, the *true cause of action* should be stated in the process; such an enactment was clearly inadequate to effect any such object, as it was simply complied with by stating the true cause of action after and as secondary to the fictitious charge of trespass. This additional clause acquired the name of the *ac etiam* clause, from the words by which it was coupled with the charge of trespass.

Clause of *ac etiam*.

The jurisdiction thus originally usurped, became by custom fully established and confirmed. The three Courts were regarded as having concurrent jurisdiction in all personal actions and ejectment, but with different modes of procedure.

This complication and variety in the practice of the Courts was found to create great inconvenience without any corresponding advantage. It was therefore abolished by the *Uniformity of Process Act*, 2 Will. IV., c. 39, whereby it was enacted that all personal actions, except in certain cases,^c otherwise provided for, should be commenced by *writ of summons*,—a judicial writ to be issued out of any one of the Courts, to be tested in the name of the chief of the Court, and to be made returnable into the same Court, and to be addressed to the defendant in person, commanding him in the name of the sovereign, to enter an appearance in Court to an action, stating the form of action, at the suit of the plaintiff; and the 1 & 2 Vict. c. 110, s. 2, enacted, that all personal actions should thenceforth be commenced by writ of summons. These statutes did not include ejectment, which by this time had become established as a mixed action, the procedure in this, therefore, continued as before.^d

Uniformity of Process Act, 2 Will. IV. c. 39.

Writ of summons.

1 & 2 Vict. c. 110.

From this time the jurisdiction of the Courts, and also

^c See Chapter on "Arrest on *mesne Process*," *infra*.

^d See "Ejectment," *infra*.

the mode of commencing an action, remained unaltered until the modern practice and procedure, as hereafter described, was founded by the Common Law Procedure Acts, 1852 and 1854.

Pleadings.

After the plaintiff had commenced his action, and the defendant had appeared in Court to dispute his claim, the points of dispute were first ascertained and defined. This was accomplished by the reduction of the matters really in controversy to distinct propositions by means of the system of alternate pleadings hereafter described. The propositions in controversy, or as they were technically called, *the issues*, were then referred by the Court to the mode of decision appropriate to the particular kind of issues, and when these were determined, judgment was given by the Court for the party entitled to it, according to law.

The issues.

Issues in law
decided by the
Court.

The issues were named *issues in law* and *issues in fact*, according as the point disputed thereby was a mere matter of law or a matter of fact. The decision of issues in law has always been exclusively within the province of the Court itself, sitting, as it is called, *in banco*. But the mode of decision or *trial*, as it is technically called, of issues in fact, depended upon the nature of the issue, some being tried by the Court, and others by various modes of trial,^e of these the most important and the only one necessary to be alluded to here was the *trial by jury*.^f When an issue in fact, proper to be tried in this way, was joined between the parties, the Court referred the issue to trial and awarded the necessary process for that purpose. In the first place a writ, called a *venire facias juratores*, was issued to the sheriff of the county, commanding him to cause a sufficient number of men of his county from the neighbourhood, where the matter had occurred, to come up to the Court

Issues in fact
tried in various
modes.

Trial by jury.

Writ of venire
facias.

^e See 3 Bl. Comm. p. 330; also "trial," *infra*.

^f As to the origin of trial by

jury, see Hallam's Cons. Hist.; Spence's Eq. Juris. vol. i.

at Westminster, upon a certain day, to decide the truth of the matters in issue. Upon the appointed day the parties, together with the jurors, came before the Court; twelve jurymen were then chosen and sworn to try the issues; the Court and jury then constituted a single tribunal, before which the trial was conducted,[§] the proceedings being under the control and guidance of the Court, and the function of the jury being to decide, at the conclusion of the trial, the truth of the facts disputed in the issues. This was called trial by jury *at bar*. Trial at bar.

The fact of all the proceedings in an action in the Superior Courts, being conducted at Westminster made the prosecution of a suit in these Courts a very expensive and troublesome proceeding. Notwithstanding this, however, the unsatisfactory nature of the local tribunals and the want of certainty and finality in their judgments induced all suitors, who were able, to resort to the Superior Courts. The great expense and delay, therefore, attending their proceedings became seriously and generally complained of, even in very early times.

Hen. I., in order, as it is said, to mitigate this, instituted local Courts of a higher order throughout the country, commissioning, in imitation of the Conqueror, certain justices, called *Justices in Eyre*, to proceed through the provinces to entertain suits that otherwise would have been prosecuted in the Courts at Westminster. Justices in Eyre.

In the reign of Hen. II., the institution of Justices in Eyre was made permanent. He divided the kingdom into circuits, and appointed local judges in each to travel from county to county in the circuit. The circuits.

From these new Courts there was an appeal to the Court of Queen's Bench, and very important cases were altogether withdrawn from their cognizance. These Courts, however, did not work satisfactorily; there was no certainty or uniformity in their judgments, and con-

[§] See proceedings in "Trial by Jury," *infra*.

sequently no finality in their proceedings. The Courts at Westminster were, therefore, still resorted to in every case where the parties were able to do so.

Assizes.

In order to mitigate this evil, Edw. I. commissioned certain of the judges of the Superior Courts to travel the circuits of the Justices in Eyre for the purpose of holding *Assizes*, a mode of trial introduced in the time of Hen. I., for the decision of certain *issues concerning land*. The judges were also commissioned to hold sessions of justice in the circuits for the trial of criminals; and subsequently in the same reign, by the statute of *nisi prius*, all issues joined in any action brought in the Courts at Westminster, that were triable by jury, were authorized to be tried by a jury summoned to meet the judges of assize when they came into the county where the action came from. This new mode of trial by jury, as distinguished from trial *at bar*, was called trial at *nisi prius*, from the words of the statute authorizing this new mode of trial, an alteration being thereby directed to be made in the writ of *venire facias*, to this effect, that the sheriff should be commanded, as theretofore, to bring up the jurymen to Westminster by the appointed term, *nisi prius*, unless before that time the judges assigned to take the *assizes* should come into his county, in which case he should take the jurymen before them. The trial having been thus had at *nisi prius*, the judges certified the result by the transmission of their record of the proceedings to the Court in the following term, and judgment was then given as usual for the party lawfully entitled to it. The trial by the assizes or by the grand assize is now obsolete, having given way to the ordinary trial by jury. The whole sittings on circuit is, however, to this day, generally called *the assizes*.

Courts of nisi prius.

New writ of venire facias.

Record of nisi prius.

Trials at *nisi prius* soon superseded the trial *at bar* for obvious reasons. The latter is, however, still occasionally resorted to in important cases, but only by leave of the Court. The Courts of *nisi prius* still retain that name,

although the writ *venire facias* is abolished, and the jury are now summoned to this Court in obedience to a precept issued by the *nisi prius* judge.

The effect of the holding of these Courts of *nisi prius* in every county for the trial of issues raised in actions brought in the Superior Courts was, that suitors flocked to the Courts at Westminster, whilst the Courts of the Justices in Eyre were quite deserted, and these, in fact, towards the end of the reign of Edw. III. ceased to be held, except for the hearing of some unimportant pleas connected with the forest laws.

The sittings of the full Court for the argument and decision of *issues in law*, and for other business transacted before the Court itself, are called sittings *in banco*.
From very early times also, some of the subordinate business of the Courts has been transacted by individual judges sitting at judges' chambers.^f

Courts of *nisi prius* are held on circuit twice every year in every county in England in the vacation between Hilary and Easter terms, and in the long vacation. They are also held, many times a year in London and Middlesex, both in term time and in vacation. The trial at *nisi prius*, and all the proceedings incident thereto, may, if it so happen, be carried on even between the 10th of August and the 24th of October.

^h See "Judges' Chambers," jurisdiction at, *infra*.

CHAPTER IV.

THE SUPERIOR COURTS OF LAW—THEIR MODERN JURISDICTION AND PROCEDURE.

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The Superior
Courts of Law.

THE Superior Courts of Law at Westminster are, the Court of Queen's Bench, the Court of Common Pleas or Common Bench, and the Court of Exchequer or Exchequer of Pleas. There is, also, the Bail Court, which is a second Court in the Queen's Bench, where one or two of the judges of that Court occasionally sit for the transaction of certain minor business of the Court. This Court was authorized by the 1 Will. IV. c. 70, by which it was enacted, that any one of the judges of any of the Courts might, when occasion required, sit apart from the full Court and make rules and orders in matters depending in the Court to which such judge belonged.

Their juris-
diction gene-
rally.

The three Courts have concurrent jurisdiction in ejectment and in all personal actions,^a including the new actions of mandamus and injunction; they have also power to order the writs of *certiorari* and *prohibition* to the new

^a As to the extent to which their jurisdiction is interfered with

by the County Court, see "Costs," *infra*.

County Courts, the former to remove, the latter to stay proceedings in these Courts. They have, indeed, a superintendence over all other Courts by prohibition if they exceed their jurisdiction. They are also the Courts of Appeal from the new County Court. A writ of *habeas corpus* may also be moved for in any of the Courts. The Superior Courts or any judge have also the power under the 19 & 20 Vict. c. 108, s. 43, to order a judge of a County Court to perform any act relating to the duties of his office; this remedy having been substituted for that by *mandamus* from the Queen's Bench; and by the 11 & 12 Vict. c. 44, s. 5, upon the refusal of any justice of the peace to do any act relating to the duties of his office, power was given to the Court of Queen's Bench to make rules, ordering such act to be done. In other respects, each Court retains its own peculiar jurisdiction.

Power over
inferior Courts.

19 & 20 Vict.
c. 108.

The Queen's Bench still retains exclusively its criminal jurisdiction, and alone exercises the remedies by the prerogative writ of *mandamus* and by *quo warranto*. The Court of Common Pleas has exclusive jurisdiction in real and mixed actions, except the action of ejectment, in which all the Courts have jurisdiction, and except also *quare impedit* at the suit of the crown,^b in which the Queen's Bench has concurrent jurisdiction with the Common Pleas. The certificates of the taking of acknowledgments of married women, under the "Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," together with the affidavits, are filed of record in the Common Pleas. The Court is also the Court of Appeal from the decision of Revising Barristers.^c Judgments also, in order to become a charge upon lands, in the hands of a purchaser, must be registered in this Court.^d

Queen's
Bench.

Common
Bench.

3 & 4 Will. IV.
c. 74.

^b Com. Dig. Pleader, 3 I.

^c 7 & 8 Vict. c. 18.

^d 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; *Beavan v. Lord Oxford*,

1 Jur. (N. S.) 1121; *Freer v. Hesse*,

4 De G. M. & G. 495; *Breere v.*

Head, 3 Jo. & Lat. 340; *Shaw v.*

Neale, 1 Jur. (N. S.) 666.

Exchequer.

Court of Ex-
chequer as a
Court of
Equity.

The Court of Exchequer retains its exclusive jurisdiction in matters relating to the royal revenue, and has power to remove from the other Courts any suit in which the title of the crown to any property is involved. The jurisdiction of this Court, as a Court of Equity, was transferred by the 5 Vict. c. 5, s. 1, to the Court of Chancery, but as this enactment excepted the jurisdiction of the Court as a Court of *Revenue*, as well as a Court of Law, it has been doubted whether it has been deprived of its equitable jurisdiction in revenue cases.^e

The Court of Queen's Bench is still in theory presided over by the sovereign and may be held in any part of the kingdom, and thus in certain instruments the proceedings in this Court are still said to be *before the queen herself*, whilst the proceedings in the other Courts are said to be before the queen's justices of the Bench or the queen's barons of the Exchequer, as the case may be.

The judges.

The judges of the Courts are as follows: in the Queen's Bench and Common Pleas, a lord chief justice and four justices, and in the Exchequer, a lord chief baron and four barons. Their duties in relation to the Courts of law are principally to hold sittings *in banco* for the decision of issues in law, and granting rules, and for the transaction of all business belonging peculiarly to the Court itself. Secondly, the holding sittings at *Nisi Prius* in London and Middlesex, and also travelling the circuits and there holding criminal or Crown Courts and *Nisi Prius* Courts in each county throughout the kingdom, and also assisting at the Central Criminal Court in London, and, lastly, sitting individually at chambers, for the purpose of granting judge's orders, and otherwise transacting certain minor business incidental to the formal proceedings in Court.

Court of Ex-
chequer Cham-
ber.

The Court of Appeal in Error from each of the Courts

^e *Attorney-General v. Halling*, 15 M. & W. 687; *Attorney-General v. Corporation of London*, 8 Beav. 270; 1 H. L. Cas. 440.

is the Court of Exchequer Chamber, which in each case is formed by the two other Courts sitting together. From this Court again there is an appeal to the House of Lords, which, for several centuries, has been established as the Supreme Court of Justice in the kingdom.^f

Court of Exchequer Chamber.

House of Lords.

The jurisdiction of the Courts is generally treated as being of two kinds, namely, the *summary* or equitable jurisdiction, and the regular or *formal* jurisdiction. The summary jurisdiction is very considerable in extent, the objects to which it applies being both numerous and varied; they may for convenience be classified under the following heads: First, the enforcing observance of the regulations of the Court generally. Secondly, the prevention of abuse of the process of the Court. Thirdly, the preventing the rules and regulations of the Court from producing hardship. Fourthly, the enforcing good conduct on the part of the officers of the Court; and fifthly, the giving relief and doing summary justice in certain miscellaneous cases.

The jurisdiction divided into summary and formal.

Summary jurisdiction, its objects.

Of the first class of cases a simple example is the setting aside proceedings on account of an irregularity in the mode in which they have been done, such as the ordering certain pleadings to be struck out in consequence of their being framed in a manner contrary to the rules of pleading, or setting aside the service of a writ upon the ground of irregularity.

The enforcing the regulations of the Courts.

In the *prevention of abuse of their process*, and its perversion for the purposes of oppression, the Courts exercise a very extensive power. They have unlimited power over their own process, and can stay proceedings brought against good faith or otherwise, without being hampered by technical rules.^g In cases where the process of the Court has been brought into action against ignorant persons, who have been imposed upon by fraud

Prevention of abuse of their process.

^f See Macqueen's House of Lords.

^g *Cocker v. Tempest*, 7 M. & W 502.

and deception, the Court will instantly relieve them, and in certain cases will visit the offender with punishment; for example, as in the case of one obtaining from another, by means of deception, a *warrant of attorney* to confess judgment. The Courts will also go so far as to vacate their own judgment, where they are satisfied they have been imposed upon, and that it has been obtained by fraud.^h

To prevent the formal proceedings producing hardship.

Of the class of cases in which the Courts interfere to prevent the formal and regular proceedings from producing hardship, the ordinary example is that of granting either party further time to plead than that allowed by the strict rules. In the same manner, if either party from some accident fails to deliver his pleading in time, and the other instantly seizes the opportunity and signs judgment, in such case the Court will set aside the judgment and allow the cause to go on, upon being satisfied that the party has a defence, or otherwise, as the case may be, upon the merits.

To maintain good conduct on the part of the officers.

Fourthly, with regard to maintaining good conduct on the part of their officers, acting as such, the Courts are very strict, and will not only relieve any one injured by such misconduct, but will punish the offending officer.

To grant relief in certain miscellaneous cases.

Fifthly, there are many miscellaneous cases in which the Courts have a summary jurisdiction, in some cases at common law, and in others by statute, to grant relief. Thus, by 53 Geo. III. c. 114, the Queen's Bench and Common Pleas have a summary power of dealing with *annuity deeds*, and by the 7 & 8 Geo. II. c. 20, and the Common Law Procedure Act, 1854, s. 219, they have power over *mortgage deeds*, by the latter Act they have power to compel a mortgagee, who has brought an action of ejectment, to reconvey the lands, if the person

Annuity deeds.

Mortgage deeds.

^h *Duchess of Kingston's case*, 2 Smith's Lead. Cas. 431; *De Medina v. Grove*, 10 Q. B. 152; *Fermor's case*, 3 Rep. 78 a; *Philipson v. Egremont*, 6 Q. B. 587.

having a right to redeem them being a defendant in the action pays the whole principal and interest, together with costs.

The Courts have also an extensive jurisdiction over *bail bonds*, by 4 Ann. c. 16, s. 20, and over *replevin bonds*, by 11 Geo. II. c. 19, s. 23. Bail and replevin bonds.

By the Common Law Procedure Act, 1854, extensive powers are given to the Courts over agreements to refer disputes to arbitration; sect. 11 provides, that if parties agree to refer any present or future disputes to arbitration, and afterwards either of them commences an action in breach of this agreement, the Court, upon the application of the defendant, and upon being satisfied that the case is one proper for arbitration, may stay the proceedings in the action upon such terms as they may think fit;ⁱ and by sect. 17, every agreement or submission to arbitration in writing may be made a *rule of Court*, on the application of either party, unless it contains words purporting that the parties intend that it should not be made a rule of Court, thus superseding the provisions in the 9 & 10 Will. IV. c. 25, by which a submission to arbitration might have been made a rule of Court, if the submission contained an agreement that it should be so made. Agreements to refer to arbitration.
Common Law Procedure Act, 1854, s. 11.

An agreement to refer matters to arbitration, although always perfectly lawful, is no bar to an action brought in respect of any of the disputes so agreed to be referred, and if either party, before the above enactment, broke such an agreement, it merely gave the other a right of action as in the case of the breach of any other independent agreement.^k Agreement to refer to arbitration no plea in bar to an action.

It used to be stated¹ that the reason why such an agreement constituted no bar to the action was, that the parties were not allowed to oust the Court of its

ⁱ See also ss. 12—17.

¹ *Tattersall v. Groote*, 2 Bos. &

^k *Livingstone v. Ralli*, 3 C. L. R. Pul. 131, by Lord Eldon.

1099, judgment of Lord Campbell.

jurisdiction. This, however, is not the correct reason; the true ground is, that after a complete cause of action has once arisen, it is not discharged by a mere executory agreement, until the agreement is actually performed.

There is, however, at least upon principle, no reason why parties should not by agreement make the decision of an arbitrator, as they may anything else, a *condition precedent* to the accruing of the right of action itself.

Interpleader.

1 & 2 Will. IV.
c. 58.

Of the miscellaneous instances now under consideration, in which the Courts exercise a summary jurisdiction, one of the most important is that given to them by the 1 & 2 Will. IV. c. 58, commonly called the *Interpleader Act*, the nature and object of which appear by the preamble to sect. 1, which is in these words, "Whereas it often happens that a person sued at law for the recovery of money or goods, wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay."

Sect. 1,
ordinary cases.

This section then enacts that upon application made by any such defendant in any action of *assumpsit*, *debt*, *detinue* or *trover*, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed^m or supposed to belong to some third party, who has sued or is expected to sue for the same,ⁿ and that such defendant does not in any manner collude^o with such third party, but is ready to bring into Court, or to pay or dispose^p of the subject matter of the action in

^m *Bentley v. Hook*, 4 Tyr. 229; *Tucker v. Morris*, 1 C. & M. 73.
ⁿ *Holmes v. Mentze*, 4 A. & E. 127. ^p *Ireland v. Bushell*, 5 Dowl. Prac. Cas. 147; *Holton v. Guntrop*, 3 M. & W. 145.
^o *Belcher v. Smith*, 9 Bing. 82;

such manner as the Court or any judge thereof may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations, as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issues,^q and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims, and determine the same in a summary manner,^r and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.

Interpleader.
1 & 2 Will. IV.
c. 58.

By sect. 6 of the same act, an analogous protection is extended to sheriffs; the preamble to the section states, "Whereas difficulties sometimes arise in the execution of process against goods and chattels, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons not being the parties against whom such process had issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions."

Sect. 6,
applying to
the case of a
sheriff.

This section then goes on to enact, that when any such claim^s shall be made to any goods taken or intended to be taken in execution, it shall be lawful for the Court, on the application of the sheriff or other officer, either before or after any action brought against them, to call before them by rule of Court as well the party issuing the execution as the party making the claim, and there-

^q See "Feigned Issue," *infra*.

^s *Roach v. Wright*, 8 M. & W.

^r *Dalton v. Midland Railway Company*, 12 C. B. 458; *Deller v. Prickett*, 15 Q. B. 1081.

165; *Ford v. Baynton*, 1 Dowl. P. C. 357.

upon to exercise for the relief of such officer the powers and authorities already mentioned in the first section. A judge at chambers has now the same power under the 1 & 2 Vict. c. 45, s. 2. There are also other miscellaneous instances too numerous to mention. Some of the most important are the issuing *habeas corpus*, *prohibition*, *certiorari*, *mandamus* or rules in the nature of *mandamus* and *injunction*.^s

The formal jurisdiction.

The *formal* jurisdiction of the Court is that by which it entertains and authorizes all the regular proceedings in an action, and by which it passes judgment and authorizes satisfaction of the same to be enforced. The power and jurisdiction of the Courts is only exercised as before mentioned, when their machinery is properly put in motion for that purpose. There are two modes of proceeding to effect this, namely, by *motion* and by *action*.

Proceedings by motion and action.

The motion and rule.

The motion is an oral application to the Court, praying it to grant a *rule* ordering some matter to be done, it is usually by motion that the summary jurisdiction of the Court is called into exercise. The motion must be supported by *affidavit*, which is a written statement on oath of all the facts upon which the application is founded. Every affidavit is divisible into the several parts hereafter mentioned, that is to say,

The affidavit.

Title.

First, the *title*,—it must be entitled in the Court in which it is used, and also in the action in respect of which it is used, if any; the names of all the parties to the action being stated at full length. If, however, the Court in which the affidavit is to be used appears in any way on the face of it, it will be sufficient, as for example, where it has been sworn before one of the judges of the Court, or where it is stated to have been sworn, “at the Queen’s Bench Office, Inner Temple,” it would be sufficient.

Commencement.

Secondly, the *Commencement*,—the affidavit must be drawn up in the first person,^t and must state the name

^s See also “Amendment,” “Discovery” and “Inspection,” *infra*.

^t Rule 2, Michaelmas Vacation, 1854.

with the correct addition and description,^u and the true place of abode of the deponent or person making it. Affidavit.

Thirdly, the *Contents*,—these must be divided into separate paragraphs, each confined to a distinct portion of the subject, and numbered.^x The only form necessary to be observed is, that every allegation must be made categorically, and not by way of implication; and where a deponent speaks to a fact of his own knowledge he must state it positively, and not merely that he believes it; but where he speaks from the knowledge of others, in cases where this is sufficient, he must state that he is *so informed* and *verily believes* it to be so. Contents.

Fourthly, the *Signature*,—the affidavit must be signed by the deponent. Signature.

Fifthly, the *Jurat*,—this is a statement that the affidavit has been sworn, together with the place and date, and before whom sworn, and it is authenticated by the signature of the last-mentioned person. Jurat.

The following will serve as an example of the form of an affidavit:— Form of affidavit.

In the Queen's Bench.

Title.

Between
ALEXANDER BATES . . . *Plaintiff,*
and
CHARLES EDWARD DAVIES, *Defendant.*

I, Charles Edward Davies, the above-named defendant, and I, J. E. P. of No. 3, Paper Buildings, in the Inner Temple, gentleman, attorney in this cause for the above-named defendant, and I, R. S. G. of the city of London, merchant, make oath and say,— Commencement.

And, first, I, C. E. D. for myself say,—

1st. That

2ndly. That

Contents.

^u As to affidavits generally, see *et seq.*
Lush's Practice by Stephen, 639 ^x Rule 138, Hilary Term, 1853.

Contents.

*And I, J. E. P. for myself say,—**1st. That**2ndly. That**And I, R. S. G. for myself say,—**1st. That**2ndly. That*

Signatures.

*C. E. D.**J. E. P.**R. S. G.*

Jurat.

*Sworn at the Master's office, Temple,
London, the 2nd day of June, 1856,
before me, M. M.*

Rule nisi or to
show cause.

Upon the *motion* the rule is either *refused*, or if the Court think that a *prima facie* case is made out, they grant a *rule nisi*, or as it is otherwise called, a rule *to show cause*, which is a rule calling upon the party against whom the application is made to show cause to the Court, by a certain time, why the matter applied for should not be ordered to be done, after which time, if no cause or no good cause be shown, the Court will make the rule *absolute*.

Rule absolute.

In certain cases, in which the rule is matter of course, it will be made absolute in the first instance, as the common rule for the costs of the day for not proceeding to trial pursuant to notice.

When a rule is granted, it is drawn up by the officer of the Court from the memorandum on the counsel's brief; it is then to be served on the opposite party, who, if he intends to oppose it, will *show cause* at the appointed time.

Filing affidavit.

A copy of the affidavit is also filed in Court, that the opposite party may have an opportunity of seeing it, in order to answer it.

Cause is sometimes also shown in the first instance, when the opposite party knows that a rule is going to be applied for, and this is sometimes advisable in order to save time: a rule *nisi*, however, does not operate as a stay of proceedings, unless two days' notice of motion

has been given to the other side, or it be so ordered specially in the rule. Two days' notice of motion.

If at the appointed time no cause be shown, the rule will be made absolute, upon an affidavit of service of the rule *nisi*. When cause is shown, it must be upon affidavit, in answer to that upon which the rule was granted; and, by leave of the Court or a Judge, either party may make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits.^y Showing cause.

Opposing affidavits.

The Court or a Judge may also order documents to be produced and witnesses to be examined,^z either before such Court or Judge, or before the Master; they may also require the whole matter to be taken before the Master, and require him to investigate and report upon it; and upon hearing such evidence as aforesaid, or reading the report of the Master, they may make such rule or order as may be just; or where it may appear more satisfactory to do so, the Court may order a *feigned issue*^a to be made up to try any questions of fact in the ordinary way. Production of documents; examination of witnesses; reference to the Master.

Feigned issue.

When the Court has heard both sides, it will either *discharge* the rule or make it *absolute*, or it may be discharged in part and made absolute in part. Nothing, however, can be granted in the rule absolute that was not contained in the rule *nisi*; it cannot, therefore, be made absolute with costs if it was not so moved originally. Where a rule is moved just before vacation time, *cause* may be directed to be *shown before a judge at chambers*, who will therefore be substituted for the full Court. Discharging or making rule absolute.

Either party may apply to have the consideration of the rule postponed to a further time than that originally appointed, this is called *enlarging* the rule; the time appointed for showing cause is never very strictly adhered Enlarging rule.

^y Common Law Procedure Act, 1854, ss. 46, 47.
1854, s. 45.

^a See "Feigned Issue," *infra*.

^z Common Law Procedure Act,

to, and if the counsel who shows cause is not ready on the appointed day, it is usual for them to arrange the time so as to accommodate each other. If the rule, however, is not disposed of in the term in which it has been drawn up, it must in general be enlarged to the next term, otherwise it expires.

Reopening and
rescinding
rule.

Sometimes a rule after being disposed of will be re-opened for consideration, and may be *rescinded*: the re-opening a rule is seldom allowed. The case in which it usually occurs is, where it has been made absolute too soon, or either party has been taken by surprise.^a It will also be generally allowed in cases where the rule is made absolute in the first instance.^b

The following will serve as examples of the form of rules:—

Form of rule.

FORM OF RULE NISI.

In the Queen's Bench.

Hadley } *The twenty-eighth day of May, 1853.*
v. } *Upon reading the affidavit of W. W. and*
Baxandale. } *others, and the declaration in this cause [or*
as the case may be], it is ordered that the plaintiff upon
notice of this rule to be given to him or his attorney shall,
upon the first day of June next, show cause why, &c.

Upon the motion of Mr. Raymond.

By the Court.

RULE ABSOLUTE WHEN CAUSE HAS BEEN SHOWN.

In the Queen's Bench.

Hadley } *The second day of June, 1856. Upon*
v. } *reading the rule in this cause on the twenty-*
Baxandale. } *eighth day of May last, the affidavit of*
A. B., [upon which cause is shown,] and upon hearing
Mr. Bovill, of counsel for the plaintiff, and Mr. Raymond,
of counsel for the defendant, it is ordered, that, &c.

Upon the motion of Mr. Raymond.

By the Court.

^a *Sandon v. Price*, 17 Law J.,
Exch. 205.

^b See Lush's Practice, 659, by
Stephen.

The rule absolute is in the next place served upon the opposite party, and may be enforced^c by *attachment*; this may be moved for upon affidavit, stating the personal service of the rule together with a demand and a refusal or neglect to do some specific act ordered by the rule, upon this a rule to show cause why an attachment should not issue will be granted, and if good cause is not shown, and the case of disobedience clearly established, the rule will be made absolute for the writ of attachment to issue, under which the disobedient person will be arrested and imprisoned for thus treating the commands of the Court with contempt.

Service of rule absolute.

Enforcing rule by attachment.

A proceeding analogous to that of the application to the Court by motion, and the granting of a *rule of Court*, takes place at judges' chambers, where one of the judges of each Court sits during term time and vacation for the purpose of granting *judge's orders*,^d analogous to the *rules of Court*, in similar matters of minor and daily occurrence, as well as in certain other cases in which the application can be made only to a judge at chambers.

Summons and order at judges' chambers.

The judge's order is sometimes granted in the first instance upon a mere *ex parte* application, in the same manner as a rule is sometimes made absolute in the first instance; in general, however, the order is only made upon the return of a summons from the judge, calling upon the opposite party to *show cause* why the matter applied for should not be done. Although the summons is usually made returnable at chambers, the judge may make it returnable elsewhere, and it is sometimes, in term time, made returnable at Westminster in the morning, when the matter is very urgent.

The summons thus takes the place of the *rule nisi*; the application for the summons, however, is not in

^c Rules directing the payment of money may be enforced by execution in the same manner as a judgment, 1 & 2 Vict. c. 110, s. 18.

^d For the origin of this jurisdic-

tion, see *R. v. Alcuin*, Wilmot's Notes, 265, and Moseley's Law Tracts, p. 1; *Prescott v. Roe*, 9 Bing. 104; *R. v. Wilkes*, 4 Burr. 2570; *Wood v. Plant*, 1 Taunt. 44.

general made to the judge himself, it is obtained as a matter of course from the officer at the judges' chambers. In many cases the application must be supported by affidavit. In others, again, none is required. The following are examples of the *summons* and *order* :—

Form of summons.

SUMMONS TO SHOW CAUSE AT JUDGES' CHAMBERS.

<i>Hancock</i> v. <i>The London and South-Western Railway Company.</i>	}	<i>Let the plaintiff's attorney or agent attend me at my chambers in Rolls Gardens to-morrow, at one o'clock in the afternoon, to show cause why [state the subject matter of the application].</i>
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Dated the 10th day of June, 1856.

J. S. WILLES.

Order.

ORDER.

<i>Hancock</i> v. <i>The London and South-Western Railway Company.</i>	}	<i>Upon hearing the attornies or agents [or counsel] on both sides [and by consent] I do order that, &c.</i>
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Dated the 11th day of June, 1856.

C. CRESSWELL.

The mode of enforcing a judge's order is to make it a rule of Court, which is done whilst the Court is sitting, as a matter of course, and this may be enforced by attachment or execution. No action lies for disobeying the order, even where it is made by the agreement and consent of the parties, such an agreement not being a contract, but merely giving the judge jurisdiction.^e

Side-bar rules.

There are also certain rules of Court that issue as of course without motion, some upon a motion-paper merely signed by counsel, and others upon the application of the attorney to the officer; these are usually called *side-bar* rules.

^e *Hookpayton v. Bussell*, 2 C. L. R. 1081; *dicta* of Parke, B., in

Wentworth v. Bullen, 9 B. & C. 840, disapproved of.

CHAPTER V.

PROCEDURE BY ACTION.

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AN action, as before mentioned, is the proceeding by which the *formal* jurisdiction of the Court is brought into operation by a suitor seeking redress for a grievance in cases to which that jurisdiction extends, the redress being awarded by a *judgment* of the Court, followed, when necessary, by certain processes to enforce the satisfaction of the same.

It has been customary, as before stated, to divide actions into *real*, *personal* and *mixed*—real actions being those brought for the specific recovery of *real property*; personal actions being those brought for injuries to the property or the person, or in respect of any personal obligation. All actions combining the characteristics of real and personal actions being called mixed actions.

Action and judgment.

Division of actions.

Real.

Personal.

Mixed.

Real and mixed actions.

Real and mixed actions, which are usually classed together, were formerly very numerous; they were reduced by the 3 & 4 Will. IV. c. 27, to the four following.

Dower.

Right of Dower,^a which is the remedy by which a widow enforces the assignment of the remainder of her dower in certain lands, a portion having been already assigned to her. This is a real action.

Dower unde nihil habet, a mixed action, applies to the case of a widow claiming her dower where none has been assigned to her.

Quare impedit.

Quare impedit is the action for claiming the right of presentation to a benefice, and also damages for the injuries sustained by being prevented in the exercise of the right. It is therefore a mixed action. It is the action resorted to in order to try a disputed *title* to an *advowson*.

Ejectment, originally a personal action.

Ejectment was originally merely a personal action, it was the remedy by which a tenant for a *term of years*, if ousted of his possession and enjoyment of the land, obtained compensation in damages for the loss and injury so sustained, no one having less than a freehold interest in land being entitled to maintain a real action for the recovery of the land itself; the action of *ejectment* was founded at this time upon the *demise* to the plaintiff, his *entry* into possession, his *ouster* by the defendant, and lastly, his lessor's *title* and right to make the demise.

Became a mixed action.

In course of time, however, the action came to be much altered, the Court, in addition to a judgment for the *damages*, awarded also a judgment of *restitution of possession*. This latter judgment was, however, by no means given as a matter of course upon the other, for this obvious reason, that being more than a personal remedy against the defendant, it might have operated to the prejudice of others occupying the land or a part of it, and claiming to be entitled to it, and who might never

^a As to the actions of *dower*, see 42r; *Garrard v. Tuck*, 8 C. B. Williams v. Gwyn, 2 Wms. Saund. 231; 1 Inst. 33 a, b.

have heard of the action, nor have had any opportunity of disputing the plaintiff's right to the land.

Ejectment.
—

The Court, therefore, before it would award judgment of possession, required that a notice of the action, together with a copy of the declaration, should be sent to all persons in possession of the land or any part of it, and an opportunity given to them of applying to the Court to come in and dispute the plaintiff's right.

The nature of this judgment of possession, and the mode in which it was given, aided by the Court's allowing a fictitious commencement of the action, as presently mentioned, caused the action of ejectment to be generally resorted to for the recovery of and for trying disputed title to land. The mode of proceeding was this, a person claiming to be entitled to land, sent to the persons in possession a copy of a declaration in ejectment accompanied by a notice informing them that an action of ejectment had been commenced by one John Doe against one Richard Roe in respect of the said land, and that the defendant Richard Roe was only a *casual ejector*, and was about to abandon the defence, and that they had better apply to the Court for leave to defend the action in his place, otherwise judgment would be given against him, and they would be turned out of possession.

The fictitious proceedings in the former action of ejectment.

Now this action of *Doe v. Roe* was an entire fiction. The plaintiff *Doe*, however, purported in the declaration to claim upon a demise from the real claimant in the action, whose position therefore in relation to the parties to this fictitious action was that of *lessor to the plaintiff*.

When the notice and declaration in the pretended action of ejectment were delivered to the persons in possession, the latter would then, if they intended to dispute the claim, be obliged to appear in Court and apply for leave to defend the action in the place of the defendant *Roe*. Upon such application, leave was granted to them only upon their agreeing not to dispute the *demise* from the real claimant to the plaintiff *Doe*, nor the *entry* nor

Ejectment. — subsequent *ouster* of the latter, but to dispute only *his lessor's title*.

In order effectually to secure this, the new defendants were first obliged, before they were admitted as such, to consent to a rule of Court providing that if they broke faith at the trial, and disputed either the plaintiff's lease, entry or ouster, judgment might be at once given in the original action, and they both turned out of possession and made to pay all the costs of the proceedings.

Consent rule. This consent rule, as it was called, was always modified in its terms in such a manner as to provide for the determination of the real question in dispute between the adverse claimants to the land.

The action by this time came to be regarded as a mixed action, and as such is referred to in the 3 & 4 Will. IV. c. 27.

By the Common Law Procedure Act, 1852, these fictitious proceedings were altogether abolished, and a very simple mode of commencing the action by *writ of ejectment* substituted.

Ejectment now in general a real action.

In some cases a mixed action.

The action^b is now in general a real action only, but in actions by landlord against a tenant it is a mixed action, and in this case the jury may award damages for the profits during the time that the tenant wrongfully held possession.

Personal actions.

Ex contractu.
Ex delicto.

Personal actions are far more numerous than the real actions, and the greater part of them are divisible into such as arise *ex contractu*, and such as arise *ex delicto* or in wrongs independent of contract, or, as they are called *torts*. This distinction of actions of contract and actions of tort has in certain cases an important bearing upon the payment of the costs of the action. The actions of *Assumpsit*, *Covenant*, *Debt*, *Detinue*, *Account*, *Annuity*,

^b As to the modern action of ejectment, the practice is regulated by the Common Law Procedure Act, 1852, ss. 168—221, and the Rules, Hilary Term, 1853, 112—114. See "Commencement of Actions," *infra*.

and in some cases *Injunction*, are actions of *contract*; and the actions of *Trespass*, *Case*, *Trover*, *Mandamus*, *Replevin*, and in some cases *Injunction*, are actions of *tort*.

Assumpsit, it will be remembered, originated as one of the actions on the case.^c Strictly speaking, it is an action for compensation in *damages* for the breach of a parol or *simple contract*. Assumpsit.

The Law of England recognizes no other distinction between contracts or agreements^d than that of *contracts by specialty or deed*, and *contracts by parol* or not by deed, or as they are commonly called *simple contracts*. Contracts divided into specialties and simple contracts.

Agreements that are merely reduced to writing, and not entered into by deed, are but parol or simple contracts in law,^e and are subject to the same rules as merely verbal contracts, the only difference being, that where the terms of the contract are written, the writing, according to the rules of evidence, constitutes the primary, and whilst in existence and obtainable the only admissible evidence of the terms of the contract. The term *parol*, however, is constantly used in contradistinction of *written*, thus *parol* evidence is spoken of as distinguished from *written*.

A *contract* is a mutual understanding and agreement between two parties, that the one shall do or abstain from doing something in consideration of something to flow from the other. Every contract, understood in its legal signification, is in the abstract divisible into two principal parts; first, the *pactum* or compact which constitutes the body and subject matter of the contract, being in fact that which the moralist, apart from all consideration of the rules of the municipal law, defines as an agreement or compact binding on the parties in conscience and in honour. Secondly, the conditions and qualifications which the policy of the municipal law has at different stages of society added to the bare Analysis of contract.

^c See "Actions on the Case," p. 13.

^d Selwyn's N. P., Assumpsit.

^e *Rann v. Hughes*, 7 T. R. 351, n.

The pactum.

Assumpsit.	<i>pactum</i> , before it will interfere and give the parties the assistance of legal process to enforce the agreement,
The <i>vinculum juris</i> .	these conditions constitute what is called the <i>vinculum juris</i> , and they vary more or less in different countries.
Analysis of the <i>pactum</i> .	Every <i>pactum</i> may, from a psychological point of view, be contemplated as passing through the three following stages to its completion. First, there is a <i>pollicitatio</i> , or
<i>Pollicitatio</i> .	a promise proffered; secondly, follows the <i>consensus</i> , or
<i>Consensus</i> .	the mutual understanding and comprehension by the parties, of the nature and terms of the offer; thirdly, there
<i>Conventio</i> .	is a <i>conventio</i> , or mutual agreement between them, the one to make and the other to accept the promise upon the terms, and otherwise as mutually understood. There can be no contract whatever of which the <i>pactum</i> , as thus defined and analyzed, does not form the basis.
Nature of the <i>vinculum juris</i> .	The <i>vinculum juris</i> comprises all those additional conditions, which the policy of the municipal law of various countries has deemed it desirable to require before the <i>pactum</i> shall be enforced by legal process.
Object to be lawful.	One of the most important of these is, that the object of the <i>pactum</i> must not be anything <i>illegal</i> or contrary to the policy of the law. Thus, an agreement entered into for immoral purposes, such as the hire of apartments for the purposes of prostitution, ^f will not be enforced. So also agreements contravening public policy, such as agreements in general restraint of trade, ^g or in general restraint of marriage, ^h or for the withdrawal of a public prosecution, ⁱ and, <i>à fortiori</i> , contracts entered into for the purpose of doing that which is forbidden by statute, such as gambling contracts on the Stock Exchange, and the like. In the second place, the <i>pollicitatio</i> must be conditional, or, in the language of the law, the promise,

^f *Girardy v. Richardson*, 1 Esp. 13; *Crisp v. Churchill*, cited in 1 B. & P. 340.

^g *Mitchell v. Reynolds*, 1 Smith's Lead. Cas. 171.

^h *Lowe v. Peers*, 4 Burr. 2228; and *Wilmot*, 364.

ⁱ *Collins v. Blantern*, 1 Smith's Lead. Cas. 134; *Coppock v. Bower*, 4 M. & W. 361.

in order to be supported, must be founded on a good *consideration*, which, it will also be observed, cannot be anything already *past*, otherwise the *pollicitatio* could not be upon condition, which implies something future.

Assumpsit.

Where there is no consideration, it is what the law terms a *nudum pactum*. What will constitute a sufficient consideration is much too long a subject to enter upon here.^k It must, however, be stated, that a promise made in consideration of a promise will be binding. In such case, there is a double contract, the promise of each party being the consideration for the promise of the other; it being borne in mind that the consideration need not necessarily be *future* in relation to the complete contract, but only to that preliminary stage of it corresponding to the *pollicitatio*; and as a general practical rule, it may be laid down that where that which is the consideration was really a part of the same transaction, it will be good:^l the policy of the law being, that a party shall not have the power of binding himself by a promise made in consideration of something which was already wholly past and completed.

The consideration.

It may also be stated generally, that the only one who can sue for the nonperformance of a promise is the one to whom the promise is made, and *from whom* the *consideration moves*, who will not necessarily be the one for whose benefit the promise was to have been performed. Thus, if I promise A. that, in consideration of his paying me 20*l.*, I will take his friend into my employment, in this case, assuming the person to be employed to have been no party to the agreement, the proper person to sue me would be A. On the other hand, it is not necessary that the person making the promise should receive any *benefit* from the consideration, any act of the promisee done at the request, either express or implied, of the promisor, by which either the promisor or a stranger derives a

Who may sue.

^k Selwyn's N. P. 42; Chit. Cont. 24.

^l *Birkmyr v. Darnell*, 1 Smith's L. C., and notes.

Assumpsit.

benefit, or the promisee suffers a loss or inconvenience, being a sufficient consideration to make the promise binding.^m

Implied and
express con-
tracts.

It is by no means universally necessary that the elements which go to make up the complete contract should have been actually agreed upon in *express* words. Actions, as well as words, may be and constantly are used as symbols of thought and intention, and where from the usage of society or otherwise these are quite clear, effect will be given to them, and they will be so interpreted as to raise a valid contract, even though not a word has been uttered. For example, if a customer goes into a baker's shop, takes up a loaf and carries it away with the assent of the latter, the law will out of these facts imply, first, a *pollicitatio* on the part of the customer to pay a reasonable price for the bread, if the baker would allow him to take it away; secondly, the mutual understanding of the parties as to the terms of this offer, and thirdly, their *conventio* or mutual agreement that it should be so.

There are, also, circumstances in which the law will imply a promise even in a case in which it is clear that there really was none even in the person's mind, for example, in the common case of a sub-tenant being compelled to pay money which his landlord is liable to pay, the law implies a promise on the part of the latter to repay it, even though the latter may have known nothing of the matter at the time.

Statute of
Frauds.

In some cases, however, it is enacted that a contract shall not be good or that no *action*ⁿ shall be maintained upon it unless it has been reduced to writing; this is required in several cases by certain sections of the 29 Car. II. c. 2, commonly called the Statute of Frauds,^o and also by Lord Tenterden's Act, 9 Geo. IV. c. 14.

29 Car. II. c. 2.

^m Selwyn's N. P. 42, 43.

ⁿ This includes a suit in equity. *Couth v. Jackson*, 6 Ves. 31; *Pennell v. Smith*, 1 Jur. 1213.

^o See these statutes and the notes in Chitty's Collection of Statutes, "Frauds," where all the cases are collected and arranged.

In the first place it may be desirable to mention the first three sections of the Statute of Frauds, for although these do not relate to contracts, they are frequently confounded with those that do.

Assumpsit.
Stat. of Frauds.

By sects. 1 and 2, all conveyances of land, whether for terms of years or freehold, except for terms not exceeding three years from the day of making them, create estates *at will* only unless in writing and signed by the party or his agent authorized in writing to do so.^p

Sects. 1, 2.

By sect. 3, no estates in land of any kind, excepting copyhold, can be assigned or surrendered but by writing.^p

Sect. 3.

By sect. 4, no action can be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge the defendant upon any special promise to answer for the *debt*,^q default or miscarriage of *another person*, or to charge any person upon any agreement made upon consideration of *marriage*,^r or upon any contract or sale of *lands*, tenements or hereditaments, or *any interest*^s in or concerning them, or upon any *agreement* that is *not to be performed within* the space of *one year*^t from the making thereof, unless the *agreement*^u upon which such action shall be brought or some memorandum or note thereof shall *be in writing* and signed by the party to be

Sect. 4.

^p And now by 8 & 9 Vict. c. 106, s. 3, all conveyances required by law to be in writing are required to be by *deed*. See *Stratton v. Pettit*, 1 Jur. N. S. 662; *Drury v. M'Namara*, 1 Jur. N. S. 1162. As to surrenders by operation of law, see *Lyon v. Reed*, 13 M. & W. 285.

^q 1 Saunders, 211 a, n. 2; 211 d, n. 1; *Birkmyr v. Darnell*, 1 Smith's Lead. Cas. 134; 1 Saund. 264, n. 1.

^r *Montacute v. Maxwell*, 1 P. Wms. 619.

^s 2 Spence, 777; 2 Chit. Stat. 142.

^t *Peter v. Compton*, 1 Smith's

Lead. Cas. 143; *Boydell v. Drummond*, 11 East, 152.

^u As a rule, the whole *agreement*, including the consideration, must be in writing. See *Wain v. Warlters*, 2 Smith's Lead. Cas. 147. The 19 & 20 Vict. c. 97, s. 3, enacts, that the promise to answer for the debt, default or miscarriage of another, shall not be invalid simply because the consideration is not stated in the writing. This, however, does not affect a case where the consideration *is* stated and is bad.

Assumpsit. charged therewith or some other person thereunto by
Stat. of Frauds. by him lawfully authorized.^x

Sect. 17. Section 17 enacts, that no *contract* for the sale of any *goods*, wares and merchandize,^y for the price of 10*l.* sterling or upwards, shall be allowed to be *good* except the buyer shall *accept part* of the goods so sold and *actually receive*^z the same, or give something in earnest^a to bind the bargain or in part of payment, or that some note or *memorandum in writing of the said bargain*^b be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

Lord Tenterden's Act,
9 Geo. IV.
c. 14.

Lord Tenterden's Act was intended to supply certain defects and omissions in the Statute of Frauds, and is now universally regarded as if it were a portion of that statute.

Sect. 5. By sect. 5, it is enacted, that *no action* shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged.

Sect. 6. And by sect. 6, that *no action* shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit,

^x The authority need not be in writing. *Emerson v. Heelis*, 2 Taunt. 48.

^y See Chit. Contracts, 343.

^z See 2 Chit. Statutes, 151; *Morton v. Tibbett*, 15 Q. B. 433; *Tomkinson v. Saight*, 25 L. J. (C. P.) 88.

^a This need not be money; any

token given will be sufficient. *Pinnel's case*, 5 Rep. 117.

^b The *bargain* is construed to mean something different to the *agreement*. The whole contract need not be in writing to satisfy this section. *Egerton v. Mathews*, 6 East, 307; see 2 Chit. Stat. 158.

money or goods *thereupon*, unless such representation or assurance be made in writing signed by the party.

Assumpsit.
—
Lord Tenterden's Act.
Sect. 7.

And by sect. 7, the seventeenth section of the Statute of Frauds was extended to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Contracts within these statutes have no tinge of *illegality* in them, they are merely incapable of being enforced, nor, indeed, are the contracts, except under the 17th section, made *void*.^c

Contracts not complying with the statute not illegal.

Although in cases within these statutes no contract will be enforced unless in writing, the converse is by no means true that if in writing specific performance will necessarily be granted in equity.^d

When a contract has been reduced to writing, whether so required by the Statute of Frauds or not, it is a general rule of evidence that parol testimony shall not be allowed to contradict or vary the writing.^e To this rule there are, however, some apparent exceptions, which frequently give rise to some very nice points.^f Thus, parties contracting, whether in writing or by parol, are considered to contract with reference to the known usages of commerce or the custom of the country; and the terms used are considered to be used in the sense belonging to them in the trade, art, or science, so that testimony is in all cases admissible to explain the meaning of terms and the

Written contracts cannot be varied by parol.

Apparent exceptions.

Meaning of technical terms.

^c *Crosby v. Wadsworth*, 6 East, 611; *Evans v. Duncan*, 1 Tyr. 283. N.B.—*Cresswell v. Wood*, 10 A. & E. 460; but see *Reade v. Lamb*, 6 Exch. 130; also *Leroun v. Brown*, 22 L. J., C. P. 1.

^d *Woolam v. Hearn*, 2 White &

Tudor, 355.

^e *Goss v. Lord Nugent*, 5 B. & A. 64; Tay. Ev. 893. But a written contract may be wholly discharged by parol.

^f *Wigglesworth v. Dallison*, 1 Smith's Lead. Cas. 305, and notes.

Assumpsit.

Latent ambiguities.

Contracts dependent, independent and concurrent.

custom of the country, or of commerce; and the contract will be read with reference to these, and they will be incorporated into it unless inconsistent with the intention to be collected from the express terms.^g *Latent*^h ambiguities also may be explained by testimony as to what the *actual* facts were,ⁱ from which the actual intention may be discovered.

Every contract, therefore, consists in its *inception* of the mutual undertaking of two parties, each to perform something on his part.

Any number of individuals may of course unite and form but one party to the contract.

Three or more distinct parties may also contract together, in which case, strictly speaking, there will be several contracts entered into.

The obligation of either party to perform his side of the contract may be *dependent* upon, *concurrent* with, or *independent* of performance by the other party of his part.

The obligation of one party is said to be *dependent* when performance by him is to wait and depend upon the *prior performance* by the other side, and in such case the former is not liable to an action for non-performance until the latter has completed his part.

The obligation is said to be *concurrent* when both sides are agreed to be, or can only be, performed at the same time; such as a mutual engagement to marry. In each case either party being ready and willing and offering to perform his part has a right of action against the other in the event of refusal to join in the performance.

The obligation of one party is said to be *independent* of that of the other when the performance by him is

^g *Hutton v. Warren*, 1 M. & W. 477; *Trueman v. Loder*, 11 A. & E. 597.

^h A *latent* ambiguity is when the instrument itself appears certain and clear, but the facts make

it doubtful, as where there are two places of the same name.

ⁱ 1 Smith's Lead. Cas. 136; notes to *Birkmyr v. Darnell*. *Haigh v. Brooks*, 10 A. & E. 309.

agreed to be made before or irrespectively of the time for performance of the other side.^k In such a case it is not a good plea to an action for non-performance, that the plaintiff has also committed a breach of his part of the contract, for the *performance* on the part of the defendant being by the contract *independent* of the other, performance by the plaintiff cannot be a *condition precedent* to the defendant's obligation to perform his part. The plea, in fact, merely discloses a right of *cross action* against the plaintiff; in all such cases the *consideration* consists of the *promise* of the other party.

Assumpsit.

Contracts are frequently spoken of as divisible into *executed* and *executory* contracts. The natural and primary meaning of these terms is that a contract which is performed is *executed*, and one that has yet to be performed is *executory*. This, however, is not precisely the sense in which these terms are used. When one party, having performed that which constitutes the consideration for the undertaking of the other, sues the latter for non-performance, he is said to sue upon an *executed* contract; when, however, one is suing upon a concurrent or independent obligation, without having performed his own part, he is said to sue upon an *executory* contract.

Contracts executed and executory.

The action of assumpsit was for some time after it was thoroughly established confined to claims for damages for the breach of contracts generally, and was not applied to cases of debt; and it was in the claim for *damages* that it differed from the action of debt on simple contract. In course of time, however, it came to be applied to all claims for money payable on simple contract, and in consequence of the strictness that was observed with regard to the action of debt, assumpsit gradually superseded that action in cases of simple contract.¹

There are now certain common counts in assumpsit Common

^k *Pordage v. Cole*, 1 Wms. Saund. 320 a, and the notes.

¹ See "Debt," p. 59, below.

counts in indebitatus assumpsit.

called *indebitatus assumpsit*, well established and in daily use.^m The ordinary indebitatus counts are, 1st, those upon a *quantum valebat* for *goods bargained and sold*, or for *goods sold and delivered*; 2ndly, upon a *quantum meruit* for *work done*, services rendered and materials provided; and again, the counts for *money lent*, *money paid* for the defendant, *money had and received* by the defendant for the use of the plaintiff, and for money payable *on accounts stated*.ⁿ

In the action of assumpsit at the present day, not only may damages be recovered, but when the action is brought for the *non-delivery of goods sold for a price in money*, the specific goods may be obtained.^o

Covenant.

Covenant is the action for *damages* for a breach of a contract entered into by deed.

Definition of a deed.

A *deed* is defined to be an instrument in *writing* under *seal*, and *delivered as the maker's deed*, the essential thing is that it should be *delivered as a deed*.

Delivery as a deed.

In order to constitute a deed, it is not necessary that it should be signed,^p and almost any impressed mark, or piece of wafer or other material will do as a seal, and after the lapse of such a time as it may be reasonably supposed this may have worn away, the total absence of a seal will be unimportant, and after the lapse of thirty years, an instrument purporting to be a deed will be deemed *primâ facie* to be one without proof.

An escrow.

An instrument that is delivered as one to become and to operate as a deed upon the occurrence of some event, will, upon the occurrence of such event, become a deed, and in the mean time it is said to have been delivered as an *escrow*.^q

The delivery.

In order to constitute *delivery*, it is not necessary that

^m See "Declaration," *infra*, "Execution for Specific Chattels and Part 2, "Declaration," "Assumpsit," *infra*.

^p See *Cherry v. Hemmings*, 4 Exch. 636; Co. Litt. 35 b.

ⁿ See Selwyn's N. P., Assumpsit; also Part 2, "Assumpsit."

^q Co. Litt. 36 a; *Christie v. Winnington*, 8 Exch. 290.

^o See 19 & 20 Vict. c. 95; also

there should be any change of possession; if the maker sufficiently declares that he delivers it as his deed it will be sufficient, whatever may become of the instrument afterwards;^r in like manner, the deliberate execution of the instrument, and the handing it over to another person, may operate as a delivery of the same as a deed without any words passing.^s

It follows also from this that a deed operates from the time of its *delivery as a deed*, and not from the date of the writing.^t

It also follows, that the mere sealing of an instrument does not make it a deed. There is no reason, therefore, why a corporation should not execute a contract by sealing it, without making a deed by so doing.

The principal peculiarity belonging to a specialty contract, as distinguished from a simple contract, is, that the law, from the solemn and deliberate nature of a deed, will infer the existence of a consideration, although none is stated therein, nor need any consideration in general be proved. At the same time, if the consideration for which the deed was in fact made, was *illegal*, this makes the contract void *ab initio*, and such illegality may be pleaded to an action on the deed.^u As a contract simply reduced to writing cannot be varied by a verbal arrangement, so a deed cannot be varied by anything even in writing that is less than a deed. But here the analogy ceases, for although, as before stated, a simple contract in writing may be wholly waived and discharged by parol, a right arising out of a deed can neither be varied nor discharged by anything less than a deed, with this exception, that after a breach of cove-

Covenant.
—
Deeds.

In a deed a
consideration
implied.

^r Co. Litt. 36 a.

^s Co. Litt. 36 a; *Doe v. Knight*, 5 B. & C. 671.

^t *Styles v. Wardle*, 4 B. & C. 911; *id.* p. 272, and 5 Rep. 1.

^u *Collins v. Blantern*, 1 Smith's Lead. Cas. 154. As to the various

rules to be observed in the construction and exposition of covenants, see Selwyn's N. P., Covenant, p. 464; also the cases of *Walker v. Giles*, 6 C. B. 662; *Earl of Shrewsbury's case*, 9 Rep. 48; *Lincoln College case*, 3 Rep. 59 b.

Covenant.
Deeds.

nant giving the covenantee a right of action for *damages*, an agreement entered into to do something in satisfaction of the *damages* and actual *performance* of such agreement, discharges the cause of action—this is called *accord with satisfaction*.^y

As to the effect of alterations or obliterations in a deed, after execution, the case of *Master and Millar*^z should be studied.

Deeds poll
and inden-
tures.

Deeds are divided into two great classes, *Deeds Poll* and *Indentures*; the former are unilateral instruments, in which the maker or makers announce to the whole community generally, that they thereby enter into a certain obligation with certain parties, or make a certain grant, or confer certain powers and authorities, or otherwise, as the case may be, and they usually commence with the words “*Know all men, that by these presents, we A. B. and C. D. do, &c.,*” as the case may be.

Deeds poll.

Deeds poll are by no means necessarily contracts; for example, a power of attorney by deed poll merely confers a power and authority to do certain acts.

A bond.

The only contract by deed poll that has any peculiar feature is a *bond*,^a by this the maker or *obligor* binds himself to pay a certain sum of money to the obligee on a certain day, and annexed to the bond and forming part of the same deed, is a *condition* or defeazance, by which it is declared, after reciting so much of the circumstances as is necessary to make the arrangement intelligible, that if the obligor shall pay a certain lesser sum by a certain time, or by certain instalments at certain times, or shall perform certain covenants which he has entered into in another deed, or shall do any act for securing performance of which the bond has been given, then the bond shall be wholly void, otherwise it shall remain in force. The sum of money which the obligor

Made voidable
by the defeaz-
ance or con-
dition.

The penalty.

^y *Blake's case*, 6 Rep. 43 b;
Rogers v. Payne, 2 Wils. 276.

^z 1 Smith's Lead. Cas., together
with the notes. See Selwyn's

N.P., Covenant.

^a The action on a bond is an
action of debt, see p. 59.

binds himself by the bond to pay, is called the *penalty* of the bond, and this when the day of payment arrives constitutes a debt if the bond is still in full force, and not avoided by virtue of the agreement embodied in the condition.

Covenant.
—
Deeds.

At common law, the whole penalty was recoverable, but by stat. 4 & 5 Ann. c. 16, in actions on bonds given to secure the payment of a sum of money, the principal and interest actually due can alone be recovered; and by stat. 8 & 9 Will. III. c. 11, in actions on bonds conditioned to secure the performance of covenants, only the amount of damages assessed for the breach of covenant, together with the costs, can be recovered.

4 & 5 Ann.
c. 16, as to
money bonds.

8 & 9 Will. III.,
c. 11, as to
bonds to secure
covenants.

An *indenture* is a deed entered into between two or more parties. It commences as follows, or to the like effect:—*This Indenture made the — day of —, A. D. —, between A. B. of the first part, C. D. of the second part, and E. F. of the third part; whereas, &c.,* then follow recitals of such of the circumstances as are necessary in order to make the operative part intelligible, after which, the thread of the first sentence is again taken up thus:—*Now this Indenture witnesseth, that the above-mentioned A. B. doth, &c., as the case may be.*

Indenture.

As is the case with bonds so an indenture does not necessarily contain a contract, thus, it may contain merely a grant or an assignment; it generally, however, contains one or more contracts in addition, or, as they are called, when made by indenture, *covenants*.

Covenants are made the subject of several divisions, thus, where the obligation arises from the express words, it is an *express covenant*; where, however, it is such as arises by implication of law out of the relation which the deed has created between the parties, it is said to be an implied covenant or a *covenant in law*;^a again, when the covenant touches the mode of dealing with or treating the land granted or demised by the deed, it is a covenant

Covenants.

Express and in
law.

Running with
the land,

^a Co. Litt. 139 b.

Covenant. *running with the land*,^b and binding upon assignees of the land, but when it is a covenant not affecting the mode of treating the land, it is a *personal* covenant or a *covenant in gross*.

and in gross. Executed and executory. Covenants are also spoken of as *executed* and *executory*; these terms being used in a very different sense to that in which they are applied to simple contracts. In the first place it must be stated that one may covenant that something *has* or has not been done, as well as that something *shall* or shall not be done; in the first case, the covenant is said to be *executed*, in the latter, *executory*; an executed covenant is, in fact, in the nature of a warranty.

Merger. The actions of *assumpsit* and covenant are thus brought for *damages* for a breach of contract; the former in the case of a *simple contract*, the latter in the case of a *specialty*. A very important matter for the consideration of the pleader, touching the relation of these two actions, is the doctrine of *merger*:^c the general rule as to which may be thus stated:—where an obligation arises upon simple contract, and the same obligation is or becomes the subject of a *specialty*, the obligation arising out of the simple contract is *merged* in the *specialty*, and the remedy on the former gone. “To an *assumpsit* the defendant may plead a *bond* given by him for the money demanded, for the bond determines the contract.”^d “The policy of the law,” says Maule, J., in *Price v. Moulton*,^e “is, that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract by the same person, against the same person, for the same demand.”

In order, however, to work a merger, there must be

^b *Spencer's case*, 1 Smith's Lead. 2, W. 46.
Cas. 22.

^c See an excellent article upon this subject in Broom's Commentaries.

^d Com. Dig. Pleader, 2, G. 12;

^e 10 C. B. 574; *Higgin's case*, 6 Co. Rep. 44b; *Middleditch v. Ellis*, 2 Exch. 623; see also 9 Q. B. 147; 13 C. B. 188.

an *obligation* created by the deed, and one *co-extensive* with that upon the simple contract. Therefore, where a simple contract debtor conveys his land by way of mortgage to his creditor to secure the payment of the debt, and the mortgage deed contains no *covenant* to pay the money, there is no merger of the simple contract obligation to pay.^f Nor will a deed made by one of two joint debtors merge the simple contract obligation, since the new obligation is not *co-extensive* with the old one.^g And, for the same reason, a bond for a fixed sum of money, conditioned for the future payment of unascertained and *indefinite* sums, does not work a merger of the obligation to pay such sums when such obligation arises, for as the amount of such sums is not limited to the amount of the fixed penalty of the bond, the obligation on the latter cannot be said to be *co-extensive* with the other.^h

Covenant
—
Merger.

Merger, therefore, is a matter of law and not a matter of intention; however, there seems to be some doubt upon the proposition whether or not an express proviso introduced into a deed, declaring that it shall not work a merger, will prevent it from having such effect. Where no such intention is expressed in the deed, it is clear that the deed works a merger *irrespective* of intention. The question, however, is whether the law goes so far as to *prohibit* parties from agreeing that there shall be two concurrent remedies, one upon a deed, and another upon a simple contract; and although the dicta of Maule and Cresswell, Js., in *Price v. Moulton*,ⁱ are universal in their terms, they are by no means conclusive upon the question, if read in connection with the particular proposition which they had to decide in that case. Maule says, "I think it is quite clear that a man cannot have a remedy

Merger a
matter of law,
not of inten-
tion.

*Price v. Moul-
ton.*

^f *Yates v. Aston*, 4 Q. B. 182.

pany v. M'Namara, 3 Exch. 628.

^g *Twopenny v. Young*, 3 B. & C. 208; *Ansell v. Baker*, 15 Q. B. 20; see also *Norfolk Railway Com-*

^h See cases just referred to.

ⁱ 10 C. B. 574.

by covenant and assumpsit for the same debt, the two are wholly incompatible and cannot co-exist. If the promise was made before the covenant, the latter must prevail. The intention of the parties has nothing to do with that."

Merger by a record.

In the same manner again, as a record is of a higher nature than a deed, where an obligation either upon simple contract or a deed becomes determined and reduced to matter of record, as by a *cognovit* or a *recognizance* or a *judgment*, the right on the inferior obligation is merged in that created by the record.^k Contracts, thus becoming matters of record, are thenceforth contracts of record, indeed all obligations arising by virtue of a record have commonly received the name of *contracts of record*, but apparently for no sufficient reason;^l they certainly, in many cases at least, want the main essentials of a contract. This merger by a record is not precisely similar to that of a simple contract by a deed, for it seems rather to extinguish altogether the original right by determining it, and substituting, as if in satisfaction, another right, and thus a judgment against one of two joint debtors extinguishes the right of action against the other,^m which, it will be remembered, is not the case where a covenant is entered into by one of two joint debtors.ⁿ When a cause of action, of whatever kind, is determined by matter of record, the original cause of action is gone altogether, and the remedy,

Different to merger by deed.

^k *Higgin's case*, 6 Rep. 44 b.

^l The reason given by Blackstone, and from his writings copied by numerous followers, "that what is enjoined by law every member of the community has by the social compact *contracted* to perform," is simply not founded in fact, and if it were, every action whatsoever might with equal propriety be said to arise *ex contractu*. It certainly seems strange that any one ac-

quainted even slightly with history should in examining a system of laws that have sprung up as the laws of England have done, look for any reason at all for the majority of legal propositions of ancient origin.

^m *King v. Hoare*, 13 M. & W. 506; *Henry v. Goldney*, 15 M. & W. 494.

ⁿ Page 57.

whatever it may be, is that which may be had on the record. The maxim is, *transit in rem judicatam*.

Debt is the action upon a *direct* obligation to pay a *sum certain*, either upon a statute, record, specialty, or upon a parol contract. The essential characteristic of the action of debt is, that the obligation is to pay a *certain* and fixed sum, or which comes to the same thing, a sum, the amount of which is ascertainable and *reducible to a certainty*, by mere calculation, according to the maxim *id certum est quod certum reddi potest*, and in ancient times this action was so strictly confined by this rule, that if the plaintiff did not prove his right to the exact sum claimed, the issue was entirely against him and he recovered nothing, it being said that he could no more recover a different sum to that which he claimed, than in an action of detinue for a horse he could recover an ox; at that time, therefore, whenever the sum of money which the plaintiff claimed was open to any uncertainty as to the exact amount to which he was entitled, the action of *debt* was a very uncertain and dangerous action to bring.

When, therefore, it was decided that the action of *assumpsit* was applicable to cases of this kind,^o where they arose upon simple contract, this action gradually superseded the action of debt in such cases; the claim in this action being for *damages* for the breach of the implied promise to pay whatever sums the plaintiff could show he was entitled to.

Afterwards, however, the ancient strictness with respect to the action of debt was relaxed, and in that action any amount, not greater than the sum claimed, might be recovered.

At the present day, the distinction between the two is much lessened, as by the Common Law Procedure Act, 1852, the amount adjudged in any action brought for the recovery of money demanded may be entered with-

^o See *Slade's case*, 4 Co. Rep. 91 a.

out distinction as to whether it has been recovered as a *debt* or as *damages*.

Qui tam actions.

There is a certain class of actions of debt for penalties imposed by statute that are called *qui tam* actions, from this, that the plaintiff sues as well on behalf of the Queen as for himself, *qui tam pro domina regina quam, &c.*

Detinue.

Detinue is the action brought for the specific recovery of chattels improperly detained. It is an action arising *ex contractu*,^p and has the same relation to a claim for the return of chattels as *debt* has to that for money. Where one wrongfully converts to his own use the goods of another, *trover* is the appropriate^q remedy, and where goods have been wrongfully taken, *trespass* or *replevin*.

The action may be maintained by any one having at the time of action the property in the goods, together with a *right of possession*.

Absolute and special property.

The property in the goods may be either *absolute* or *special*; these terms have been rather loosely applied, and confusion has arisen in consequence; however, so long as it is borne in mind that different lawyers have applied the words in somewhat different ways, the danger of confusion will be escaped. One may be said to have an *absolute* property in goods, when he has the *exclusive* right and interest against the whole world, in the possession, enjoyment, and disposition thereof. A *special* property is a right to the possession and disposition of the goods short of an absolute property, such as the property that a hirer of goods has in them for the term of the hiring, or that a carrier of goods has in them during the period of the bailment. Where the property of the plaintiff in the goods is an absolute property, according to this definition, it clearly *implies* a right of possession; however, it may without inconvenience be stated, as a clear rule, that a *right of possession* is essential in order to support this action. The action is founded

^p *Walker v. Needham*, 4 Scott, N. R. 222.

^q Occasions constantly happen,

however, in which any one of these actions may be resorted to indifferently.

on four things,—the property in the plaintiff, the possession in the defendant, the improper detention by the defendant, and the right of possession in the plaintiff.

Detinue.
—

Formerly, in this action the defendant had the option of returning the goods or paying their assessed value. However, by the Common Law Procedure Act, 1854, this option was transferred to the plaintiff. He may now cause the defendant to be distrained in all his goods and chattels, until he delivers back his specific goods, and if they cannot be found, the plaintiff may take the assessed value instead.

This action, as must be evident from its nature, can only be brought for the recovery of individual chattels that can be identified.

The action of *annuity* has now become quite obsolete. Annuity.

The action of *account* lies against one who has received money, to the whole or a portion of which the plaintiff is entitled, and will not render an account of it. Account.
This action had nearly become obsolete when the provisions of recent legislation did away with many of the difficulties attending it. The power given to the Courts by the Common Law Procedure Act, 1854, to refer complicated accounts to an arbitrator, and to order the production and inspection of documents, has rendered this action more available for the future.^r

Injunction is a recent form of action introduced by the Common Law Procedure Act, 1854. In all cases where a party may bring an action for breach of contract or other injury, he may bring an action to claim a writ of injunction, forbidding the repetition or continuance of such breach of contract or injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right. The action may be brought solely for an injunction, or it may be joined with a claim for damages or other redress. It may be added here, Injunction.

^r See *Eason v. Henderson*, 12 Q. B. 986 ; *Beer v. Beer*, 12 C. B. 76.

Injunction. — that it is also provided with respect to the *injunction*, that it shall be lawful for the plaintiff at any stage of the proceedings, after the commencement of the action, namely, the issue of the writ, whether before or after judgment, to apply *ex parte* to the Court or a Judge for the writ of injunction to issue.

Trespass.

For direct injury.

Trespass is the action which is brought for an injury caused either to the property or the person *directly* and immediately by the act of the defendant; the usual examples of the action are, for the breaking and entering and injuring the plaintiff's close, which is called an action of trespass *quare clausum fregit*, or for injuries to the person of the plaintiff, as the action for an *assault and battery* and false imprisonment; and thirdly, the action of trespass *de bonis*, for seizing, carrying away and damaging *personal property*.^s

Case.

For indirect injury.

The action of *case* comprises a large class of actions, introduced as before mentioned, along with others, by the Statute of Westminster 2, in the 13 Edw. I.^t This action applies in all cases where *damages* are sought for an injury to the person or property, resulting *mediately* and consequentially from the act of the defendant; the distinction between trespass and case, now comparatively unimportant, is frequently very refined and difficult of application.

Distinction between trespass and case.

The broad and leading distinction is between *direct* and immediate injuries on the one hand, and *mediate* and consequential on the other. The action of trespass was always for an injury, supposed, in contemplation of law, to be accompanied with violence, and for this reason was usually called trespass *vi et armis*, and where the injury resulted directly from the original force of the defendant's act, the proper remedy was *trespass*; where, however, the defendant's act, although the natural and proper cause of the injury, brought it about indirectly only, here *case* was the remedy; for example, "if I

^s See Selwyn's N. P., Trespass.

^t See p. 13.

throw a log of timber into a highway, and afterwards another man tumbles over it, an action on the *case* only lies, but if in throwing it I hit another man, he may bring *trespass*, because it is an immediate injury."^u So, again, if one receive an injury in his business or otherwise, by the false and wilful slander or libel of another, the action must be on the case.

Case.
—

The distinction does not turn upon the lawfulness or unlawfulness of the original act, but upon the directness or indirectness of the injury from the defendant's act.

The same act may produce both direct and indirect injury, as if by false imprisonment I sustain special damage, as if I forfeit my recognizance, here there may be an action of *trespass* for the false imprisonment, and *case* for the indirect injury resulting therefrom. The distinction is now not of such importance as formerly, as it is only necessary to set forth the facts substantially constituting the cause of action, without regard to any particular form, nor is it necessary to state what the form of action is in the writ. In fact, every action may now be on the case, for, in actions on the case, as Lord Coke says, a man states his case as it really is.

Trover is an action on the case for *damages*, for the Trover. wrongful conversion by the defendant to his own use, or the wrongfully depriving the plaintiff of the use and possession of the plaintiff's goods.

In order to support this action, it must be shown that the plaintiff had either an absolute property in the goods, or a special property with the right of possession at the time of the *conversion*. It must also be shown that there has been a *conversion* by the defendant,^x and for this purpose it may be sometimes necessary to prove a demand and refusal to deliver up the same. One joint tenant or tenant in common cannot bring trover against

^u See judgment of Blackstone in *Scott v. Sheppard*, 1 Smith's Lead. Cas. 210.

^x See Selwyn's N. P., Trover, Conversion.

another, except where there has been a destruction of the joint property. Nor can the action be brought except in respect of *personalty*.

Mandamus.

The action of *mandamus* is also an action introduced by the Common Law Procedure Act, 1854. In all cases where one is *personally interested* in the fulfilment of any *duty*, he may bring an action to claim a writ of *mandamus* commanding the defendant to perform such duty. He may, also, join with such action a claim for compensation for the injury sustained by the breach of duty. The action does not interfere with the jurisdiction of the Queen's Bench by the prerogative writ of *mandamus*. It is supposed that it was not intended by the legislature that this action should extend to the enforcing specific performance of a contract as such, and the Court of Queen's Bench have gone so far as to decide that the act only enables the other two Courts to grant the old prerogative writ of *mandamus*, which hitherto that Court alone had granted, and that it does not apply in any case where the duty in which the plaintiff is interested is a private duty, but only where it is of a public nature.¹

Notwithstanding this decision, the point cannot be considered as quite settled. In one respect the new writ of *mandamus* is a more extensive remedy than the prerogative writ, namely, in this, that a plaintiff may claim the former in a case where he has also a remedy by action for *damages*, whereas the old prerogative writ can only issue where there is no other remedy available.²

Replevin.

Replevin is an action brought in certain cases to try the right of the defendant to take certain *goods* of the plaintiff, which the defendant has *taken* from the plaintiff, and *wrongfully*, as the latter alleges. This is an action which, in general, must be commenced in the County Court, or some local Court of inferior jurisdic-

¹ *Benson v. Paul*, 2 Jur. (N. S.) 425. Corner's Crown Practice, *Mandamus*.

² See Tapping on *Mandamus*;

tion. The action, however, even when brought in respect of goods of trifling value, may involve important questions of title, as, in certain cases, where the question turns upon the right to take a distress damage feazant.

Replevin.
—

In all cases where the plaintiff will give security to prosecute the action with effect and without delay, and, unless judgment go by default, to prove to the Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.*, and to return the goods if a return should be adjudged, he may *commence* the action in one of the Superior Courts;^a and in like manner, when the action has been commenced in the County Court, the defendant, upon giving security to defend the action, and if the plaintiff should not discontinue or be nonsuited, to give proof to the same effect as above-mentioned, may apply to one of the Superior Courts or a judge to remove the cause into such Court by *certiorari*.^b

The revival of a judgment, or its application to one who does not appear on the record, by means of a writ of *Scire Facias*, or writ of *Revivor*, or by a *Suggestion* on the roll, is by some regarded as an additional class of actions. It seems, however, more convenient to treat of these proceedings in connection with the judgment, and the modes of obtaining satisfaction thereof.^c

Revivor and
scire facias.

^a 19 & 20 Vict. c. 108, s. 65.

Vict. c. 108, s. 67.

^b See "Commencement of Actions, Replevin," p. 78; 19 & 20

^c See "Execution," "Scire Facias," &c., *infra*.

CHAPTER VI.

COMMENCEMENT OF THE ACTION.

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Commence-
ment of the
action.

THE first step in the proceeding by action is the issue of the *writ*, of which there are for this purpose two principal classes, namely, *original writs* and *writs of summons*. The *issue* of the writ is the first *proceeding* in and the *commencement* of the action.

As a general rule, when one has a legal claim or cause of action against another, he may at once bring his action without any preliminary intimation to the intended defendant of his intention to take legal proceedings. There are, however, some exceptions to this rule, where particular statutes have in specified cases made a *notice of action* a condition precedent to the right of maintaining the action; thus the 11 & 12 Vict. c. 44, s. 9, enacts, that in any case in which a justice of the peace is sued for any act done in the *execution of his*

Notice of ac-
tion.
11 & 12 Vict.
c. 44.

office, he shall be entitled to one month's notice of action in writing.^a So also where it is intended to sue a constable for anything done in obedience to any warrant, a demand of the perusal and copy thereof must be made six days before any action is brought, and if this demand is complied with, the justice who issued the warrant must be joined in the action, and upon the trial the constable will, upon proof of his authority, be entitled to a verdict, and the justice only will be liable. So also by sect. 138 of 9 & 10 Vict. c. 95 (County Court Act), it is enacted, "For the protection of persons acting in the execution of that statute, that *notice in writing* of any action to be brought against any person for anything done in pursuance of the act, shall be given to the defendant one calendar month at least before the commencement of the action."

Notice of
Action.
—

9 & 10 Vict.
c. 95.

There is in some cases a difficulty in determining whether or not the act done was one in the *execution of the duty* or in *pursuance* of the statute. It may be generally stated, that where the act was done *bonâ fide* in the belief that it was authorized, the party is entitled to a notice of action.^b

The statute 5 & 6 Vict. c. 97, s. 4, enacted that all notices of actions required by any statute before that time should be of one uniform length, namely, *one calendar month's notice*. In statutes since that time, however, this uniformity has not been adhered to in requiring notice of action.

5 & 6 Vict.
c. 97.

Another important matter for preliminary consideration is, the operation of the Statutes of Limitation, by which the right to bring an action is limited to a certain time after the cause of action first accrued, that is, from

Statutes of
Limitation.

^a See Part 2, "Notice of Action" as to the form. 14 C. B. 149; *Taylor v. Nesfield*, 3 E. & B. 725; and *Booth v. Clive*,

^b See *Hughes v. Buckland*, 15 M. & W. 346; *Tarrant v. Baker*, 10 C. B. 827.

Stats. of
Limitation.

21 Jac. I. c. 16.

3 & 4 Will. IV.
c. 27.

3 & 4 Will. IV.
c. 42.

Lord Camp-
bell's Act,
9 & 10 Vict.
c. 93.

5 & 6 Vict.
c. 97.

3 Geo. IV.
c. 126.

24 Geo. II.
c. 44.

the time that an action might first have been brought : the period of limitation varies in different cases.

By the 21 Jac. I. c. 16, actions of debt on simple contract, trespass *quare clausum fregit*, trespass *de bonis*, detinue, assumpsit, account (except merchants' accounts) case in general, trover, and replevin, are to be brought within six years, and trespass to the person within four years, and slander within two years : by 3 & 4 Will. IV. c. 27, all real actions and actions for rent, and all entries and distresses, must be within twenty years after the right accrued, whether to the person claiming or to one through whom he claims.

By the 3 & 4 Will. IV. c. 42, actions of debt for rent upon indenture, and actions upon deeds or recognizances, are to be brought within twenty years ; and actions for penalties, given by statutes, within two years by a party aggrieved, and one year by a common informer ; and actions on awards not made by deed, and for copyhold fines, or against a sheriff for an escape, or for money levied on a writ of *fi. fa.*, within six years.

Actions under Lord Campbell's Act, by the representatives of persons killed by accident, on behalf of the surviving relatives, must be brought within twelve months of the death.

Actions on local and personal acts previously passed are limited by the 5 & 6 Vict. c. 97, to two years, or, in the event of continuing damage, to twelve months, after the damage has ceased.^c

There are also other particular cases in which certain statutes, authorizing certain penal actions, require them to be brought even within a shorter time, as in the 3 Geo. IV. c. 126 (Turnpike Act), where the limitation is three months.

By the 24 Geo. II. c. 44, s. 8, no action shall be brought against any justice of the peace for doing any-

^c *Richards v. Easto*, 15 M. & W. 244.

thing in the execution of his office, or against any constable, headborough, or other officer, acting as aforesaid, unless within six calendar months after the act committed. The same provision is repeated as to justices in the 11 & 12 Vict. c. 44, s. 8.

Stats. of
Limitation.

And lastly, by the 19 & 20 Vict. c. 97, s. 9, actions upon merchants' accounts are limited to six years.

19 & 20 Vict.
c. 97.

Provisoes are however made in these Statutes whereby the period of limitation is extended, under certain circumstances.

Extension of
period in cer-
tain cases.

The stat. 21 Jac. I. c. 16, enacted that a plaintiff, being an infant, a married woman, insane, imprisoned or beyond the seas at the time the cause of action accrued, should have six years after the removal of the disability. And by the statute 4 & 5 Anne, c. 16, s. 19, where any one against whom there is a cause of action of trespass, detinue, trover, replevin, account, case, assumpsit, covenant or debt shall be, at the time the cause of action accrues, beyond the seas, the person entitled to the action shall have the full time allowed in the 21 Jac. I. c. 16, after the return of such first-named person; a similar proviso is also contained in the 3 & 4 Will. IV. c. 42, in which also the term, *beyond the seas*, as used in that act, and in the Statute of James, is defined, not to include any portion of Great Britain and Ireland or the Channel Islands.

21 Jac. I. c. 16.

4 & 5 Ann.
c. 16.

3 & 4 Will. IV.
c. 42.

The Statute 3 & 4 Will. IV. c. 27, gives to plaintiffs under certain disabilities ten years after such disability has ceased, and to their representatives ten years from their death, provided that no action should be brought more than forty years from the time the right first accrued.

3 & 4 Will. IV.
c. 27.

The 19 & 20 Vict. c. 97, however, has made a great alteration in these disabilities; the absence of the plaintiff beyond the seas, and also his imprisonment, constitute no longer any disability, and the term, *beyond the*

19 & 20 Vict.
c. 97.

..

Stats. of
Limitation.

Statute once
running does
not stop.

seas, is no longer to be interpreted under the statute of Anne to include Ireland or any of the Channel Islands.

With regard to the disability, it must be borne in mind, that if once actually removed, for ever so short a time, the statute will begin to run, and no consideration will afterwards suspend its operation.

It is also provided by the Statutes 3 & 4 Will. IV. cc. 27 and 42, that, in the cases^a to which these Statutes refer, if an *acknowledgment* in writing be given to the party entitled, or a *part payment* made, then that a *further full period of limitation* shall be given, to commence at the date of the acknowledgment or part payment.

Taking case
out of the sta-
tute.

Irrespective of any statutory provision, cases arising *ex contractu*, may be taken out of the operation of the statute by the creation of a new obligation, and consequently a *fresh right of action*, from which the period of limitation will begin to run again : for example, where there is a fresh contract to pay.^b

Statute merely
bars remedy,
does not dis-
charge the
right.

The Statutes of Limitation do *not* of necessity *discharge the right*, they merely bar the remedy by suit, and, apart from this mode of obtaining redress, the right may still subsist, and if the plaintiff has any other remedy it is not taken away ; thus, a solicitor may avail himself of a lien upon his client's deeds, although his action is barred ;^c so, also, if one pays money to another

^a It should have been added above, that by sect. 42 of 3 & 4 Will. IV. c. 27, all actions and distresses for arrears of rent or interest in respect of money charged upon land or in respect of a legacy are limited to six years, with the same proviso in case of an acknowledgment or part payment, and with also other provisions in case of possession by prior incumbrancers. See Chit. Stat. vol. iii. p. 103, note (a).

^b A part payment of principal or interest is sufficient evidence of such a promise to pay. But by Lord Tenterden's Act, no acknowledgment or promise by words only shall be sufficient evidence, unless in writing and signed. See Chit. Stat. vol. iii. p. 67, and Chit. Contracts, 717 ; see also Addenda, p. xviii.

^c *Blunden v. Desart*, 2 Dru. & War. 405.

in respect of a debt barred by the statute, he cannot recover it back as he could do if the debt had been discharged. A debt barred by the statute cannot, however, be made available as a set-off.^f

The writs by which actions are commenced in the Superior Courts are divisible into two principal classes, namely, *original writs* and *writs of summons*, applicable respectively to different classes of actions.

There are but three actions at the present day that are commenced by *original*, namely, the real actions of *right of dower* and *dower unde nihil habet*, and the mixed action *quare impedit*. The writ is issued, as formerly, out the Common Law Office in Chancery, and is returnable to the Common Pleas, but *quare impedit*, at the suit of the crown, may also be brought in the Queen's Bench.^g The original.

The following will serve as an example of the writ:—

ORIGINAL WRIT IN QUARE IMPEDIT.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the Sheriff of Middlesex greeting. Command B., Bishop of London, and C. D., esquire, and E. F. clerk, that justly and without delay they permit E. L., esquire, of Number 4, Parliament Street, in the city of Westminster, to present a fit person to the Church of —, which is vacant, and belongs to his presentation, as he saith, and whereof he complaineth that the said Bishop and C. D. and E. F. unjustly hinder him; and unless they shall do so, and if the said E. L. shall give you security of prosecuting his suit, then summon, by good summoners, the said Bishop and the said C. D. and E. F., that they be before our Justices, at Westminster, in eight days of Saint Hilary, to show wherefore they will not do it, and have you there the names of

^f See "Set-off," *infra*.

writ generally, see p. 79.

^g As to the mode of issuing the

the summoners and this writ. Witness ourself at Westminster, the fourteenth day of January, in the nineteenth year of our reign.

Writ of summons.

All other actions, except replevin, in the cases which will be hereafter mentioned,^h are commenced by *writ of summons*, which is a judicial writ issuing from any one of the Courts. It is addressed to the defendant in person, and commands him to appear in Court if he wishes to defend the action.

Three kinds.

There are three different kinds of writs of summons. First, the *common writ of summons*, applicable to all personal actions whatsoever. Secondly, the *writ of ejectment*. Thirdly, the *special writ on a Bill of Exchange* or promissory note.

Common writ of summons.

The common writ of summons is applicable to all personal actions whatsoever, and The Common Law Procedure Act, 1852, did away with the necessity of stating the form of action in the writ as required by the Uniformity of Process Act (2 Will. IV. c. 39).

Certain modifications in the writ.

The former act directs certain modifications in the writ under certain circumstances; thus a writ directed to a defendant, resident out of the jurisdiction, differs slightly from the one applicable to the case of a defendant within the jurisdiction of the Court. Different forms of the writ are given in the Schedule to the Act.

The memorandums and indorsements also to be made on the writ vary in different cases; thus, where the action is for a debt, the *amount* must be indorsed on the back of the writ; so, again, there are other indorsements, to be presently mentioned.

The writ must state the names of all the plaintiffs and defendants in full, and the place and county of the supposed residence of the defendant.ⁱ Errors upon these points, however, do not vitiate the writ, and they will be at once amended by a judge.

^h See "Replevin," p. 78.

ⁱ Common Law Procedure Act, 1852, s. 2.

The following Writ of Summons, where the defendant resides within the jurisdiction, will serve as an example:—

Writ of
Summons.
—

VICTORIA, &c. *To C. D. of —, in the County of —, we command you, that within eight days of the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Common Pleas, in an action at the suit of A. B.; and take notice, that in default of your so doing the said A. B. may proceed therein to judgment and execution. Witness, Sir John Jervis, Knight, at Westminster, the fourteenth day of January, 1856.*

Form of common writ of summons.

The following memorandum must be made upon the writ:—

Memorandum.

N. B.—This writ is to be served within six calendar months from the date thereof, or if renewed from the date of such renewal, including the day of such date, and not afterwards.

The following indorsement must be made on the writ before service:—

Indorsement
before service.

This writ was issued by E. F., of —, attorney for the said plaintiff [or by A. B. in person, who resides at —].

After service of the writ, the following indorsement must be made upon it:—

Indorsement
after service.

This writ was served by X. Y. on C. D. the defendant, on Monday, the — day of —, August, 1856.

(Signed) X. Y.

Whenever the action is brought for the recovery of a liquidated or certain sum of money, the amount to be claimed, together with the costs, must be indorsed on

Common indorsement of amount of debt.

Writ of
Summons.

the writ. This is called the common indorsement of the debt, and is in the following form:—

The plaintiff claims 75l. for debt, and 2l. 2s. for costs, and if the amount thereof be paid to the plaintiff or to his attorney within four days from the service hereof further proceedings will be stayed.

The common indorsement must be made in all cases where the sum of money claimed is a sum certain and *not mere damages*.

In all cases where the defendant resides within the jurisdiction of the Court, and the claim is for a liquidated or certain sum, as above, the plaintiff is *at liberty*, in addition to the common indorsement, to indorse on the writ the *particulars* of the amount claimed, and this will be considered as the plaintiff's particulars of demand in the action.

Special in-
dorsement of
particulars of
debt.

This is called the *special indorsement*, and the effect of it is this, that as the fullest information is thus given to the defendant of the nature and particulars of the plaintiff's claim, if the defendant does not appear to defend the action, the plaintiff is at liberty to proceed to judgment directly, and without the intermediate step of a declaration with formal particulars of demand.¹

Effect of omit-
ting special
indorsement.

If the plaintiff should omit to make the special indorsement in a case in which he might have done so, and the defendant fails to appear; in such case the plaintiff, upon proceeding to judgment, will not be allowed the costs of the declaration and particulars, which would have been rendered unnecessary had he specially indorsed the writ. It becomes therefore necessary, in every case which admits of it, to make the special indorsement, if there is the slightest probability of the defendant failing to appear, and allowing judgment to go by default.

The following will serve as an example of the special indorsement of particulars.

¹ See "Particulars" in Chap. on Declaration, *infra*.

The following are the particulars of the plaintiff's claim:—

Writ of Summons.

1855.		£	s.	d.	Special in- dorsement.
Aug. 31.	To hire of a carriage and pair of horses for six months, from March 1 to August 31 . .	97	0	0	
	To hire of saddle horses during same period, as by accounts delivered	31	0	0	
		128	0	0	
	By cash	20	0	0	
	Balance due . .	£108	0	0	

The plaintiff also claims interest on the above sum from the date of the writ until judgment, at the rate of 5l. per centum per annum.

N.B.—Take notice, that if a defendant served with this writ within the jurisdiction of the Court do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed [with interest at the rate specified], and the sum of 4l. 4s. for costs, and issue execution at the expiration of eight days from the last day for appearance.

Whenever a plaintiff intends to claim a writ of mandamus or injunction, a notice of such intention must be indorsed on the writ.^k

The writ of ejectment is a writ of summons appropriate to this action only; it issues out of any one of the Courts. The form of it is as follows:—

Writ of ejectment.

VICTORIA, &c. To X. Y. Z. and all persons entitled to defend the possession of — [describe the property

^k See Lush's Practice, Writ of Summons.

In Ejectment. *with reasonable certainty] in the parish of —, in the county of —, to the possession whereof A., B. and C., some or one of them, claim to be [or to have been on and since the — day of —, A.D. —] entitled, and to eject all other persons therefrom. These are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our Court of —, to defend the said property, or such part thereof as you may be advised, in default whereof judgment may be signed, and you turned out of possession.*
Witness, &c.

In the action of ejectment there are no pleadings. The issue is made up at once by the plaintiff.¹

Special writ on bill of exchange or promissory note.

By the summary procedure upon Bills of Exchange Act, 1855, all actions upon bills of exchange and promissory notes, if brought within six months after the same shall have become due, *may* be commenced by writ in the following form:—

VICTORIA, &c. *To C. D. of —, in the county of —. We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service you obtain leave from one of the judges of the Courts at Westminster to appear, and do within that time appear in our Court of —, in an action at the suit of A. B., the said A. B. may proceed to judgment and execution. Witness, &c.*

Memorandum and indorsement on the writ.

The following memorandum is to be made on the writ:—

N.B.—This writ is to be served within six calendar months from the date hereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

¹ See "Issue in Ejectment," *infra*; also Common Law Procedure Act, 1852, ss. 168 — 221;

Reg. Hilary Term, 1853, 112, 113, 114, *infra*.

Indorsement to be made before service :—

On Bill of
Exchange.
—

This writ was issued by E. F. of —, attorney for the plaintiff [or by A. B. in person, who resides at, here give the plaintiff's residence, with the name of the town and parish, and the street and number, or the name of the house].

On the back of the writ must be indorsed the following particulars of the plaintiff's claim :—

Indorsement of
particulars of
bill or note.

The plaintiff claims £—, principal and interest, [or balance of principal and interest] due to him as the payee [or indorsee] of a bill of exchange [or promissory note], of which the following is a copy, [here follows a copy of the instrument with all indorsements], and also — shillings for noting, and £— for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof further proceedings will be stayed.

The following notices also must appear upon the writ:—

Notices on the
writ.

Take notice, that if the defendant do not obtain leave from one of the judges of the Courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty, at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £— for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

On Bill of
Exchange.
—

Indorsement to be made after service :—

This writ was served by X. Y. on C. D., on Monday, the — day of —, A.D. 1856.

X. Y.

Plaintiff not
obliged to sue
in this manner.

It is, however, always optional with a plaintiff to commence the action on a bill of exchange or promissory note either in this manner or by the ordinary writ of summons.

Replevin.

Before 19 & 20
Vict. c. 108.

The action of *replevin* is quite peculiar. The rule is, that it must be brought in the County Court or other local Court. Before the 19 & 20 Vict. c. 108, the action was always commenced in one of these Courts in the following way: the person whose goods had been taken, and, as he conceived, wrongfully taken, applied to the *sheriff* to *replevy* them, that is, to cause the goods to be restored to him upon his giving security to prosecute an action in some local Court of inferior jurisdiction to try the right to take them, and to return the goods and pay the costs of the action should it be determined against him.

The action was then brought in such inferior Court, usually the new County Court, and if it happened that certain important questions were involved, it might then have been removed at the instance of either party to one of the Superior Courts, upon certain terms, as to giving security. Proceedings in replevin have been, however, greatly altered by the above-mentioned act.

From henceforth the powers and responsibilities of the Sheriff, with respect to replevin bonds and replevins, are to cease, and the Registrar of the County Court of the district in which any distress, subject to replevin, shall be taken is empowered to approve replevin bonds and grant replevins, and to issue all necessary process in relation thereto.

Actions of replevin may also be commenced in any of the Superior Courts in the same manner as any other personal action, if the plaintiff at the time of replevying,

will give security to the registrar granting the replevy, conditioned to commence an action of replevin against the distrainer in the Superior Court within a week, and to prosecute the action with effect and without delay, and, unless judgment go by default, to prove to such Superior Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that the rent or damage for which the distress was made exceeded 20*l.*, and to return the goods, if a return thereof should be adjudged.

Replevin.
—

So, also, any action of replevin brought in a County Court may be removed into any Superior Court by a writ of *certiorari*, if the defendant apply to such Court or a judge for the writ, and shall give security conditioned to defend the action with effect, and, unless the plaintiff discontinue or be nonsuited, to prove to such Superior Court to the same effect as above mentioned.

When leave for the *certiorari* is obtained, the writ is issued to the County Court, directing that Court to send the record of the proceedings up to the Superior Court. When this is done, a notice thereof is given to the plaintiff, and the parties proceed to the pleading as in an ordinary action.

The mode of issuing the writ is as follows: the plaintiff or his attorney prepares the writ in proper form, either written or printed upon a slip of paper or parchment, with all the proper memorandums and indorsements; he takes this to the proper officer of the Court or office, out of which the writ is to issue, in order to have it authenticated and made into a valid writ; with this officer he deposits a memorandum or *præcipe* of the writ, such as, for example, the following *præcipe* of a writ of summons:—

Mode of issuing writs.

The *præcipe*.

Writ of Summons for A. B. against C. D., of —, in the county of—.

E. F. plaintiff's attorney.

The officer thereupon completes the writ by stamping it with the proper seal, bearing the date of the day and year and the name of the Court or office.^m

Execution of writ.

The writ is in the next place to be executed. In the case of an *original* writ, it is sent to the sheriff for execution, and is by him returned to one of the Courts as therein directed.

Service of writ of summons.

The writ of summons, however, is served by the plaintiff or his agent upon the defendant; the service should, where practicable, be personal, which is generally done by handing the defendant a copy, and giving him an opportunity of comparing it with the writ itself, should he require it. However, there may be personal service without placing the copy in the defendant's physical possession; showing it to him, and if he refuses to take it, throwing it down, is sufficient.ⁿ

Service of the writ will, under certain circumstances, be dispensed with. Thus, where reasonable efforts have been made to effect personal service, and either the writ has come to the knowledge of the defendant, or he wilfully evades service of the same, and has not appeared thereto, the Court or a judge has power to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as they may think fit.^o

Concurrent writs.

The writ may be served in any county. Where there are several defendants, and the plaintiff wishes to have them served at the same time, or if there is a doubt as to where the defendant is to be found, and the plaintiff wishes to send in search of him to several places at once, he may at any time, within six months of the time of issuing the writ, issue *concurrent writs*, which will

^m As to the proper mode of stating defendant's name and title and occupation, &c. in certain cases, see Lush's Prac. See also same as to effect of omissions, &c. in writ.

ⁿ See *Digby v. Thompson*, 1 Dowl. 363; *Heath v. White*, 13 L. J., Q. B. 218.

^o Common Law Procedure Act, 1852, s. 17.

remain in force for the same time as the original, and may be used in the same manner.

The writ is only in force for six calendar months, and it must be served, or the equivalent of service must take place, within that time. If this is not done the action must be commenced over again. The writ may, however, at any time before the expiration of the six months, be *renewed*. This is done by taking it again to the Writ Office, and procuring it to be stamped with a seal, indicating that it is renewed, with the date of such renewal. The writ is then good for another six months from the date of renewal, and if service or its equivalent be not effected within the six months, it may be again renewed, and so on from time to time it may be kept in force.

The writ in force for six months.

Renewal of writ.

The renewal of the writ is sometimes most important in its effect upon the operation of the statutes of limitation. Thus, let it be supposed in the case of an action which cannot be commenced beyond six years after the cause of action arose, that a writ has been issued just in time to save the operation of the statute, this writ may be served at any time within six months, even though in the mean time the six years' limitation may have expired, as it will be remembered that the *original issuing* of the writ is the *commencement* of the action. Now it is evident that in such case, if the writ were allowed to expire without anything having been done, the action would be *barred* for ever, as it would be too late to *commence* a fresh action.

However, the service of a writ after its proper time has expired will be *valid* if the defendant pass it over without objection, as it is an irregularity only and not a nullity. In case a writ is served after it has expired, the defendant should apply to a judge at chambers to set aside the service.

Effect of irregularities in writ and service.

In the same manner an omission of, or imperfection in, any of the indorsements on the writ, does not make it

void, but only renders the service of it liable to be set aside upon application to a judge, or to be amended at the expense of the plaintiff.^p But service on Sunday is wholly a nullity. Service may also be effected in Court, this not being regarded, as in ancient times, a contempt of Court.^q

Arrest on
mesne process.

Formerly, as already stated, if the defendant disobeyed the summons to appear in Court, certain *writs of process* issued from the Court, to compel him to do so, and, in course of time, these writs of process became in fact the commencement of the action, the original upon which they were founded being seldom issued until afterwards, and generally not at all.

These proceedings are, however, now all abolished, with the exception of *arrest on mesne process*, which, in certain cases, is retained, but as collateral only to the main proceeding in the action,^r and it is limited to those cases in which the plaintiff has a cause of action to the amount of 20*l.* or upwards, and there is probable cause for believing that the defendant is about to quit England unless arrested.^s

If defendant
fail to appear,
plaintiff has
judgment by
default.

The appearance of the defendant, however, pursuant to the writ of summons, is even more effectually secured at the present day than it was formerly. If he should fail to appear, the plaintiff will be entitled to judgment^t in his favour, which is called judgment by default, upon which he may at once issue *final process* or execution.

Appearance of
defendant.

The next proceeding then is the *appearance* of the defendant. In ancient times this was required to be an actual appearance before the Court, either of the defendant in person or his attorney. At the present day, however, it is effected by the delivery of a memo-

^p Common Law Procedure Act, 1852, s. 20.

^q *Anon.* MS., in Exch., 1856, by Alderson, B., and Pollock, C. B.

^r *Brown v. M'Millan*, 7 M. & W. 196.

^s See "Arrest on Mesne Process," *infra*; and Lush's Practice, 523.

^t See "Judgment by Default," *infra*.

randum, in the following form, to the proper officer of the Court:—

A. B. } *The defendant appears in person* [or, *E. F.,*
against } *attorney for C. D., appears for him*.
C. D. }

If the defendant appears in person, his full address must also be given.^u The following entry must also be made upon this memorandum:—

Entered the — day of —, A.D. 1856.

The appearance in the action of *ejectment* differs somewhat from that in other cases; any one in possession of the land or any part of it, either personally or by his tenant, may, by leave of a judge, appear to the writ, although not named therein. A defendant, also, appearing in this action as a landlord must state it in the appearance. So, also, if one appears to defend for a part only, he must give notice to that effect within four days after appearance.^v

Appearance in
ejectment.

As soon as the defendant has appeared, both parties are in contemplation of law before the Court, and they next proceed in the regular course to the statement of the matters in dispute, either by means of the pleadings or certain other modes hereafter mentioned.

There are, however, certain cases in which the defendant is entitled to require the plaintiff to give security for the cost of the action before proceeding any further. The cases in which this can be done are, however, rare, and are principally confined to the case of a plaintiff permanently resident abroad and without real property within the jurisdiction sufficient to answer for the costs.^x When, however, one has brought an action of ejectment

The plaintiff
in certain cases
required to
give security
for costs.

^u The time allowed for appearance will be seen on the face of the writs.

^v Common Law Procedure Act, 1852, ss. 168—174.

^x Chit. Arch. 1327.

unsuccessfully, he will not be allowed to proceed in a second, without giving security for the costs.^y

Compelling the plaintiff to give security for costs is entirely within the discretion of the Court,^z and the fact that the plaintiff is a pauper or bankrupt or insolvent is not sufficient ground for requiring security.^a The defendant must appear before he can make the application. And he must in ordinary cases apply before issue joined.^a

^x Chit. Arch. 1327.

^z *M'Culloch v. Robinson*, 2 N. R.

^y Common Law Procedure Act, 353.
1854, s. 93.

^a *Ross v. Jaques*, 8 M. & W. 135.

CHAPTER VII.

THE PLEADINGS IN GENERAL.

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UPON the appearance of the defendant, both parties are, in contemplation of law, *in Court*. They are not, however, yet in a condition to ask the Court to enter upon the consideration of the matters in dispute. They are required, as a preliminary step, to reduce these to *issue*, that is to say, to distinct and definite propositions, cleared of all undisputed matters.

Disputes to be reduced to issue.

An *issue* may be strictly defined to be a *single, certain* and *material* proposition, affirmed by the one and denied by the other.

Definition of an issue.

The parties may accomplish this by agreeing together as to what the particular propositions in dispute are, and

stating them accordingly.^a Or failing this, they must proceed to effect the same result by means of the *pleadings*.

The pleadings.

The pleadings consist of a succession of alternate statements and counter-statements by the plaintiff and defendant, so controlled by certain rules that all disputed points are at each stage singled out and set apart from such as are not disputed, in the manner hereafter described.

Objects of the issues.

The objects of thus requiring the parties, as a preliminary step, to reduce the matters in dispute to issue are, first, that, the nature of the points in dispute being ascertained, they may be respectively referred to the appropriate tribunals for decision; secondly, that the tribunal before which any of the matters shall come for decision may be clearly and definitely informed of the questions to be decided; thirdly, that the plaintiff and defendant, being each informed of the definite propositions to be maintained or contradicted by them respectively, as the case may be, may be spared the useless expense and trouble of preparing to support propositions which were never intended to be disputed.

Ancient oral pleadings.

In ancient times, when the appearance was actual, the pleadings were conducted orally in open Court, either by the parties themselves or their pleaders, under the immediate superintendence of the judges.

Declaration or count.

The plaintiff was first called upon for a statement of his cause of action. This was called the *narratio* or *count*, and since then the *declaration*, and where he had two or more distinct causes of action, he was required to state each in a distinct count. The defendant was then called upon for his *plea*, or his statement of what his defence was, and, passing over certain preliminary objections that he might have made to the suit, he might have denied the truth of the whole or a material part of the facts alleged in the count, in which case he was said

Plea.

^a See "Issue and Special Case by Consent without Pleadings," *infra*.

to plead by way of *traverse*, or he might have disputed the validity of the plaintiff's claim, asserting that it disclosed no cause of action, in which case he was said to plead by way of *demurrer*; in both of these cases, it is clear that an issue would already have been arrived at in the former case upon a matter of fact, in the latter upon a point of law. The defendant, however, might, without disputing the validity or the truth of the declaration, have made a defence by disclosing additional facts, destroying the *primâ facie* legal effect of those alleged by the plaintiff; this being called a plea in *confession and avoidance* of the declaration.

By way of traverse.

Demurrer.

Confession and avoidance.

To illustrate these by example, suppose the plaintiff to declare that he and one E. F. were in the service and employment of the defendant, in his trade and business of a miller, and that the said E. F. conducted himself in the course of such his employment in a certain negligent and improper manner, and so caused a serious injury to befall the plaintiff. Now, in the first place, the defendant might have traversed the fact, that E. F., who caused the accident, was in his service, or he might have traversed the fact, that he had been negligent.

Illustration,

of traverse,

Secondly, he might have *demurred* to the declaration, upon the ground that a master is not responsible to one servant for the negligence of a fellow servant,^b at least, not unless he had continued to retain such servant, knowing his negligent character, and had entrusted him with employment, which, in such case, it was not proper or safe to have done, which was not alleged by the plaintiff to have been the case. If the plaintiff had merely by inadvertence omitted to state in his declaration a fact which was material to his right of action, he would have been allowed, upon discovering his mistake,

of demurrer,

^b *Priestley v. Fowler*, 3 M. & W. 1; *Patterson v. Wallace*, 1 Macq. H. L. 748; *Hutchison v. York, Newcastle and Berwick Railway* Comp., 5 Exch. 343. N. B.—Judgment of Alderson, B. See also an article on this subject, 2 Jur. (N.S.) Part 2, p. 381.

Illustration.

of confession
and avoidance.

to have corrected himself, and have amended his statement by the addition of the omitted fact.

Thirdly, the defendant, without disputing the truth or validity of the count, might have pleaded, that after the occurrence of the matters therein mentioned, and before the commencement of the action, the plaintiff and the defendant agreed together, that the defendant should give, and the plaintiff should accept, the sum of 100*l.*, in full satisfaction and discharge of all claims of the plaintiff against him by reason thereof, and that afterwards and before the action the defendant paid to the plaintiff, and the plaintiff then accepted, the sum of 100*l.* in full satisfaction and discharge as aforesaid.

Replication.

When the defendant thus introduced new facts, without disputing the truth of those alleged by the other side, it is evident that as yet there would have been no issue arrived at, everything alleged by the plaintiff having been admitted; the Court, therefore, passing over the original allegations of the plaintiff, as not involving any of the matters in dispute, called upon him to *reply* to the new matter advanced by the defendant, in avoidance of the declaration; and by his *replication* the plaintiff might, in like manner, have traversed or demurred to the plea, or have replied by way of confession and avoidance. To illustrate this by a different example, suppose the defendant to have pleaded in confession and avoidance, that the plaintiff had by deed released and exonerated him from the claim; the plaintiff, without disputing the validity of such a defence, or the fact that he had given the deed, might have alleged that the deed was obtained from him by the fraud of the defendant.

So long as the validity and the truth of the statements of either party were thus admitted by the other, and fresh facts were brought out, to avoid their effect, no issue was arrived at, and each statement thus admitted, was in its turn passed over and discarded, as containing no

point in dispute; and the parties were compelled to go on alternately answering each other until the matter really in dispute being advanced by one of them, and denied by the other, brought them at last to issue.

It is also evident, that, when the declaration contained several counts, an issue might have been arrived at in a different stage upon each, so that whilst issue might have been joined on one count at the very first stage, upon others it might have been postponed for several.

Issues joined at different stages.

Each stage of the pleadings has a distinctive name; thus there is, first, the declaration of the plaintiff; secondly, the plea of the defendant; thirdly, the plaintiff's replication; fourthly, the defendant's rejoinder; fifthly, the plaintiff's surrejoinder; sixthly, the defendant's rebutter; seventhly, the plaintiff's surrebutter, beyond which they have no distinctive names, but they seldom go beyond the rejoinder.

Names of successive pleadings.

A demurrer, although in strictness a pleading, is always spoken of as a *demurrer*, at whatever stage it occurs, in contradistinction of the other pleadings.

During the progress of the pleadings above described the pleaders were controlled by certain rules, which were enforced by the presiding judges. The principal objects of which were, first, the *attainment of an issue*. Secondly, the securing a *material issue*, that is, one proper to determine the controversy between the parties, and not one merely frivolous or beside the real point of the case. Thirdly, the *prevention* of confusion and *embarrassment* to either party, from an informal or illogical statement of the pleading. Fourthly, the *prevention of prolixity* in the pleadings.^c

Rules of pleading.

Their objects.

When the parties had thus come to issue, the Court, in the case of an issue on a point of law, either decided it at once, or, by an adjournment of *curia advisari vult*, postponed the cause to a future day, when they delivered their judgment; and in the case of an issue on a matter

Decision or trial of issues.

^c See Part 2, "General Rules of Pleading."

Judgment.

of fact, they awarded the mode of *trial* and adjourned the cause to a future day for that purpose. And after the decision of the issue or issues the judgment of the Court upon the whole cause was given in favour of the plaintiff or defendant, according as the former had succeeded or failed on the whole in showing that he had a good cause of action.

The record.

^d “ During the progress of the oral controversy above described a minute of the pleadings, inclusive of the issues, was taken down on a parchment roll by an officer of the Court. This minute comprised, in addition to this, a short notice of the nature of the action, the date of the appearance of the parties in Court, and of the acts of the Court itself during the progress of the pleadings, these chiefly consisted of what were called *continuances*, the nature of which was as follows: there were certain purposes for which the law allowed the proceedings to be adjourned or continued over from one term to another, or from one day to another, in the same term, and when this happened an entry of such adjournment and of its cause was made on the parchment roll, and by that entry the parties were appointed to reappear at the given day in Court; such adjournment was called a *continuance*, and the award of the mode of trial on an issue in fact, and also the postponement of the cause to a future day to hear the decision of the Court on an issue in law, were each of them *continuances*, and were entered as such upon the roll; if any interval took place without such adjournment duly obtained and entered, the chasm thus occasioned in the progress of the suit was called a *discontinuance*, and the cause was then considered as *out of Court* by the interruption, and not allowed afterwards to proceed. The official minute of the pleadings and other proceedings thus made on the parchment roll were called the *record*. As the suit proceeded, similar entries of the

^d Stephen on Pleading, 33.

remaining incidents of the cause were from time to time entered upon it, and when complete it was preserved as a perpetual intrinsic and exclusively admissible testimony of all the judicial transactions which it comprised. From the beginning of the reign of Richard I. commences a still extant series of records down to the present day."

In tracing the development of the practice, from this stage to the present, it is not easy, nor is it important, to ascertain the precise steps in which it advanced. Modern pleadings.

In the reign of Edward III. the pleadings were no longer delivered orally in Court, but were written down by the parties, or their pleaders, in an office of the Court, upon the roll, the ancient form of entry being adhered to. This is said to account for the practice of drawing the pleadings in the third person, which prevails even to the present day.

Since this time considerable changes have been made. The pleadings are no longer entered on the roll in the first instance, but are drawn up by the parties on separate pieces of paper, and delivered alternately to each other or their attornies, out of Court, and afterwards, when they are finished, they are all entered together upon the roll if and when required. Written pleadings.

Originally, as before mentioned, every proceeding was entered upon the roll at the time of its occurrence, the roll acquiring a different name as the proceedings recorded thereon advanced from stage to stage, thus it was called at different stages the *plea roll*, the *issue roll*, the *nisi prius record*, and *judgment roll*. In course of time, however, the formal entry of proceedings on a roll came to be omitted, except when the roll was actually required. Thus, in the case already mentioned, the pleadings were not entered on the roll until the latter was required for the purposes of having the issues tried. So, again, the judgment roll was not made up unless it was required for the purpose of having it reviewed by a Court of Error, or for some other purpose, in which Entry on the roll, gradually discontinued except in certain cases.

Entry on
record.

the judgment would be required to be authenticated. In every case, however, the roll was *supposed* to have been made up and completed at each stage, and no subsequent proceedings were regular, except with reference to a supposed record of the proceedings completed down to that stage.

At the present day, however, this is no longer the case. It was directed by Reg. H. T. 1834, r. 15, that the entry of proceedings on the record for trial, or on the judgment roll, according to the nature of the case, should be taken to be and should be the first entry of the proceedings in the cause or of any part thereof upon record. And by the Common Law Procedure Act, 1852, s. 206, and Reg. H. T. 1853, r. 70, it was directed that it should be no longer necessary, for the purpose of issuing execution, to enter any proceedings upon any roll. The law, therefore, at present does not suppose the existence of a record where none is actually required. It may, however, at any time be drawn up formally from the memorandum required to be made of it in Court,^e if at any time it should be required, either for the purpose of bringing error or to be given in evidence or the like.

Rules govern-
ing the written
pleadings very
strict.

When the pleadings came to be drawn up in writing, and delivered by the parties to one another out of Court, they were governed by rules even more strictly than when they were conducted orally under the immediate superintendence of the Court.

In the very early periods of pleading, the rules were very simple; thus, during the period of oral pleadings, any confusion or defect in the mode of statement, or any attempt to embarrass, was at once remedied, by the Court directing the party to put his pleading into the proper shape, so as to get rid of the objection; in like manner, either party was allowed to correct his pleading upon discovering that he had made a mistake.

^e See "Signing Judgment," *infra*.

In course of time, however, when the pleadings came to be written, positive rules were required to be established, and these subsequently increased greatly, both in number and completeness, and as a necessary consequence in intricacy also, and the practice of pleading became elaborated into a highly-finished and refined art. There were, however, several defects, which are generally considered to have detracted from the merits of this system, and indeed, in the opinion of many, the refinement of some of the rules contributed as frequently to the failure as to the carrying out of justice. Rules of written pleadings.

It was said that the serious consequences, which in some cases attended an accidental deviation from some highly refined rule, were wholly unproportioned to the importance of the rule itself; and that the whole cause was made sometimes to turn upon the questionable non-observance of a rule designed merely to insure a clear and logical arrangement, being probably a good and proper rule, but not sufficiently important to be made the turning point of the whole controversy irrespectively of its merits. Thus, in what may be called the middle ages of pleading, every defect and omission in the form of the pleadings was a ground of demurrer, or might have been taken advantage of, when the whole cause was over.^f

It is true, that at all times the Courts exercised more or less the power of allowing the parties to amend their pleadings at any time before they were entered on the record; there were, nevertheless, numerous cases in which the merits of the cause were sacrificed to mere formal defects in the proceedings, owing to the limited powers of amendment which the Courts possessed. Amendment. They possessed originally considerable powers at common law, of amending all the proceedings at any stage. This power was, however, in the reign of Edw. I., for some reason or other, greatly restrained, and it was ordered by the king that no alteration should be made in any proceedings after they were once entered on the re-

^f See "Arrest of Judgment," *infra*.

No amendment could be made in any record.

cord.^f The power of amendment still remained, however, when the proceedings had not yet been entered of record.

According to the interpretation which was originally put upon this rule, it was considered that the Courts had no power to make an alteration in any entry upon the roll after the term in which the entry had been made,^g although until the end of the term the whole record of proceedings that had taken place during that term was still considered to be *in fieri*, and consequently amendable in any manner that might appear to the Court necessary and proper, in order to make it accurate and complete. When, however, the term was at an end, and the proceedings were *continued* to another term, the entries were then held to constitute a record within the meaning of the rule.

However, subsequently, this interpretation was modified, and the Courts were considered to have power to amend the proceedings at any time before the *issue* was entered on the *nisi prius* record for the purposes of the trial, or in case there was no issue of fact to be tried, then until the *judgment* was entered of record, until which times respectively the whole record was considered to be *in fieri*. When, however, the record was complete, the power derived by the Courts from the common law to make amendments was at an end. And if any error, however trifling, was overlooked until after this period, it might then have been taken advantage of, and might for ever have barred a plaintiff of his just claims.

Statutes of Jeofails.

Certain statutes, however, called Statutes of *Jeofails*,^h were passed at various times, curing after *verdict*ⁱ in cases where there is a trial, and after *judgment*^j where

^f Brit. proem 2, 3; 4 Inst. 255.

^g 3 Bl. Com. 410.

^h This name is said to have been derived from the Norman words *jeo faile*, made use of by the pleader when he perceived and

admitted that he had made a mistake. 3 Bl. Com. 407.

ⁱ 32 Hen. VIII. c. 30; 18 Eliz. c. 14; 24 Jac. I. c. 13; 16 & 17 Car. II. c. 8; 5 Geo. I. c. 13.

^j 4 & 5 Ann. c. 16.

there is no trial, all trivial defects of form in the writ and pleadings.^k By far the most extensive enactment of *jeofails* is the 50th section of the Common Law Procedure Act, 1852, by which it is enacted, that, when issue is joined on a demurrer, the Court shall proceed to give judgment according as the very right of the cause and matter in law shall appear unto them, *without regarding* any imperfection, omission, defect in or lack of form, and that no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect in or lack of form.

Jeofails.

Common Law
Procedure Act,
1852, s. 50.

In the reign of Elizabeth, it was enacted that no demurrer should be allowed for any omission or defect in form, unless the objection were specially pointed out by the demurrer; this introduced the distinction between *special* and *general* demurrers.

Special de-
murrers.

And by sect. 51 of the above act, it is enacted, that no pleading shall be deemed insufficient for any defect which could theretofore only be objected to by special demurrer, abolishing in effect all demurrers founded upon any defect of form.

Sect. 51.

It was, however, at the same time enacted, that if any pleading should be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party might apply to the Court or a judge to order such pleading to be struck out or amended.

From a very early time, also, *amendments* in the record itself were authorized by statute;^l and these powers of *amending* were greatly extended by the Common Law Procedure Act, 1852, sect. 222, the words of which are, "It shall be lawful for the Superior Courts of Common Law and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend

Statutes of
Amendment.
Common Law
Procedure Act,
1852, s. 222.

^k As to defects cured at common law by *pleading over*, and by *verdict*; see "Arrest of Judgment," *infra*.

^l 14 Edw. III. c. 5, s. 1; 9 Hen. V. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. c. 12.

Amendment.

all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the Court or judge may seem fit,^m and all such amendments as may be necessary for the purpose of determining in the existing suit the real questionⁿ in controversy between the parties shall be so made." The same provision was extended by the Common Law Procedure Act, 1854, sect. 96, to the proceedings authorized by that act.^m

Modern practice when pleadings disregard the rules.

At the present day, in the event of either party disregarding the rules in drawing up his pleading, the other may deal with the erring pleading in one of three ways, according to the nature of the fault.^o

First, in certain cases it may be treated altogether as a *nullity* and as if no pleading had been delivered; for example, where the pleading is totally irrelevant, such as a plea of *non assumpsit* to an action of trespass. Secondly, where a pleading is drawn up irregularly, or in a form calculated to embarrass and delay the fair trial of the action, application may be made to a judge at chambers or to the Court to order the objectionable pleading to be struck out or amended. Thirdly, where a pleading, without being a mere nullity, substantially fails to disclose a sufficient cause of action or a sufficient answer to the previous pleading, as the case may be, it may be *demurred* to as bad in substance; this, in fact, raises a formal issue in law between the parties, which may really involve the whole point in dispute.

^m As to when and upon what terms, see Lush's Pract. "Amendment," under the various heads.

ⁿ See "Variance," *infra*; *Richie*

v. *Van Gelder*, 9 Exch. 762.

^o See further under "Replication," *infra*.

CHAPTER VIII.

MODERN PLEADINGS ; FIRST,

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THE pleadings commence, as already stated, with the count or *declaration*, which is the plaintiff's statement of his cause of action.

Every declaration is divisible into five parts, namely, the title, the venue, the commencement, the body and the conclusion. Declaration divisible into five parts.

The title consists of the name of the Court in which the action is brought, with the day of the month and year in which the declaration is delivered. 1. Title.

The venue^a of the declaration is an entry in the margin of the name of the county in which the *trial* is to take place, in the event of an issue in fact being raised. The venue is generally in the choice of the plaintiff. In certain cases, however, there is no choice about it; this depends upon whether the cause of action is *local* or *transitory*. In other cases the Court will, upon the application of the defendant, order the venue to be changed. 2. Venue.

^a As to the general principles of the law of *venue*, see Part 2, "Venue."

Venue.

Local and transitory.

A cause of action is local when it could only have happened in one place, such as actions for injuries to real property or for the recovery of real property, such as trespass *quare clausum fregit*, *ejectment* and others. A cause of action is *transitory*^b when it might have arisen anywhere, and of this kind are most personal actions except trespass *q. c. f.* and also *replevin*, which are local, and also actions upon judgments and actions that are by particular statutes made local.^c When the cause of action is local, the trial must take place in the county in which it arose. Where, however, it is transitory, the venue may be laid in any county.

Changing venue.

The venue, however, will be ordered to be changed upon application to the Court or a judge, upon affidavit that the cause of action, if any, arose in another county,^d in this case the venue is said to be changed upon the common affidavit, the Court will not, in general, entertain this application after issue joined. There are, also, certain *special* circumstances in which the venue will always be changed; as, for instance, where a fair trial cannot be had in the county in which the venue is laid.^e In such cases the venue will even be changed in *local* actions.^f The plaintiff,^g also, may apply to amend his declaration by changing the venue.

3. Commencement.

The commencement of the declaration consists of a statement that *the plaintiff sues the defendant*, setting forth their names at full length, and also adding whether the plaintiff sues in person or by his attorney, or by

^b *Mostyn v. Fabrigas*, 1 Smith's Lead. Cas. 340, and notes; and see "Venue," Part 2.

^c See *Peacock v. Bell*, 1 Wms. Saund. 73, and notes.

^d As to when a cause of action is said to arise in one place, see *Roff v. Miller*, 19 L. J., C. P. 278; *Wilde v. Sheridan*, 21 L. J., Q. B. 260; *Wood v. Perry*, 3 Exch. 442;

Norman v. Marchant, 7 Exch. 723; 21 L. J. 256.

^e See Lush's Practice, Changing Venue.

^f 3 & 4 Will. IV. c. 42, s. 22; *Jones v. Price*, 7 Dowl. 103; *R. v. Amery*, 1 T. R. 365.

^g *Stroud v. Tiley*, 2 Str. 1162; *Ayres v. Buston*, 6 Taunt. 408.

his next friend if he is an infant, and also the capacity in which he sues, if he is suing in another's right, as, for instance, as *executor*.

The body of the declaration consists of a statement 4. Body. of the cause of action for which the plaintiff sues the defendant. Where the plaintiff has several different Several counts. causes of action, he must state each in a distinct count or clause; in like manner each count must contain a complete cause of action in itself.^f Where, however, there have been a succession of similar acts on the part of the defendant, each of which would furnish a complete cause of action, it will not necessarily follow that they must each be made the subject of a separate count, although they may be; thus, a plaintiff may sue in one count for trespasses on divers days and occasions, or for a sum of money made up of claims upon any number of distinct transactions, and thus all the various claims included in the common money counts may be placed together as a single count.^g

The plaintiff has no right to several counts upon the same cause of action.^h The practice of having numerous counts, setting out the same cause of action in various ways, arose by reason of the serious consequences that formerly followed the slightest variance between the cause of action as stated in the count and as proved in evidence: the reason having been done away with,ⁱ they are no longer allowed; and any counts used in violation of this rule may be struck out upon application within a reasonable time, although they may be allowed if the Court or judge think them proper for determining the real controversy between the parties on its merits,^k and

Several counts for same cause not allowed.

^f See Part 2, "Declaration," "Joinder of Actions."

^g *Morse v. James*, 11 M. & W. 831; *Jourdain v. Johnson*, 2 C. M. & R. 564; *Marshall v. Whiteside*, 1 M. & W. 191; and Part 2, "Declaration."

^h Reg. Trinity Term, 1853, r. 1.

ⁱ See "Variance and Amendment at the Trial," *infra*.

^k As to when several counts will be allowed on the same cause of action, see Part 2, "Declaration;" *Hemming v. Trenery*, 9 A.

even when no application has been made to strike them out, they may subject the plaintiff to certain costs after the trial.¹

Common,
indebitatus or
money counts.

The declaration must in general be full and definite, setting out explicitly and with certainty every proposition material to the cause of action. In all actions of assumpsit, however, in which the plaintiff claims a sum of money due to him from the defendant, usually called actions of *indebitatus assumpsit*,^m he is at liberty to state his cause of action in a short *common form*, suitable to the particular case; fourteen examples of which are given in the schedule to the Common Law Procedure Act, 1852. They are usually called the indebitatus counts, or money counts, or common counts; they are in themselves very vague, but the evil of this is remedied by the plaintiff being required, in every case where there is a common count, to deliver to the defendant a statement of the particulars of his claim.

5. Conclusion.

The conclusion of the declaration is a statement of what the plaintiff claims, which is either a sum of money or the return of his property or both, as the case may be.

The following will serve as an example of a declaration:ⁿ—

Example in
assumpsit.

Title.

DECLARATION IN ASSUMPSIT.

In the Exchequer of Pleas.

The seventh day of March, A.D. 1856.

Venue.

Commence-
ment.

Body.

*London, } Samuel Taylor, by F. M. his attorney,
to wit. } sues Edward Taylor and Charles David-
son, for that the defendants, being carriers of passengers*

& E. 926; *Cahoon v. Burford*, 13 M. & W. 136; *Bulmer v. Bousfield*, 9 Q. B. 986; *Simpson v. Rand*, 1 Exch. 688; *Gilbert v. Hales*, 2 D. & L. 227. As to term *merits*, see *infra*.

¹ Reg. T. T., 1853, r. 3, *infra*.

^m See Part 2, "Common Counts in Assumpsit," also p. 51, *supra*.

ⁿ Precedents of declarations in other personal actions and in real actions will be given at the conclusion of Part 2.

for hire, to wit, from London to the town of Melbourne, in Australia, it was agreed between the plaintiff and the defendants, that the plaintiff and his wife should become passengers in a certain vessel of the defendants, about to proceed on a voyage, to wit, from London to Melbourne aforesaid, and should and would be conveyed in the said vessel upon the said voyage for certain hire and reward, to be paid to the defendants in that behalf, and that the defendants should and would, amongst other things, send with and cause to accompany the said ship, upon and during the continuance of the said voyage, a medical officer, for the benefit and protection of the health of the passengers; and the plaintiff and his wife became passengers in the said ship, and proceeded and were conveyed therein upon the said voyage; and although the plaintiff performed all conditions precedent to entitle him, and he became and was entitled, to have a medical officer sent with the said ship as aforesaid, yet the defendants did not send, nor cause to accompany the said ship on the said voyage any medical officer, and the plaintiff, by reason of this default on the part of the defendants, sustained great loss, in consequence of the serious and continued illness of his wife, as well during as after the said voyage, occasioned by the want of timely medical assistance during the said voyage, and the plaintiff has been thereby not only deprived of the assistance and services of his wife, but has also been put to great expense in and about attempting to procure her cure.

Example in
Assumpsit.

And the plaintiff also sues the defendants for money payable by the defendants to the plaintiff for money paid by the plaintiff for the defendants at their request, and for money lent by the plaintiff to the defendants, and for money found to be due from the defendants to the plaintiff upon accounts stated between them, and the plaintiff claims 150l.

Common
count.

Conclusion.

There are several cases in which the plaintiff is re-

Particulars of claim.

1. When common counts.

quired to deliver particulars of his cause of action. In the first place, in all cases when the plaintiff declares on the common money counts, he must deliver particulars of his demand with his declaration. In all other cases, also, where the cause of action is not specifically disclosed,^o the Court or a judge will order particulars to be given. This, however, is seldom done in actions *ex delicto*, although it will, under special circumstances.^p

2. Infringement of patents.

Secondly, in actions for the infringement of patents,^q and in actions for the infringement of copyright,^r the plaintiff must deliver with his declaration particulars of the breaches complained of.

3. Actions under Lord Campbell's Act.

Thirdly, in actions under Lord Campbell's Act,^s by the relatives of persons killed by accident, particulars must be delivered of the relatives in whose behalf the action is brought.

4. Generally when so ordered.

Fourthly, particulars must be given by the plaintiff in all actions whatsoever, when the defendant obtains a rule, or order for particulars, from the Court or a judge.^t

Particulars no part of declaration.

The particulars form no part of the declaration, and are not entered on the record; a copy of them, however, is required to be tacked to the *nisi prius* record. Their effect is merely to bind the plaintiff in the evidence;^u and also a replication departing from them, although not open to demurrer, will be ordered to be struck out.

^o *Squire v. Todd*, 1 Camp. 293; *Rettalick v. Hawkes*, 1 M. & W. 573.

^p *Horloek v. Lidiard*, 10 M. & W. 677; *Snelling v. Channell*, 5 Dowl. 80.

^q 15 & 16 Vict. c. 83, s. 41 (Patents Act).

^r 5 & 6 Vict. c. 45, s. 16 (Copy-

rights Act).

^s 9 & 10 Vict. c. 93.

^t See "Application for Particulars," *infra*.

^u *Ferguson v. Mahon*, 9 A. & E. 245; *Hingham v. Robins*, 5 M. & W. 94; *Law v. Thompson*, 15 M. & W. 541. See Part 2, "Particulars."

The following will serve as an example of particulars :—

In the Exchequer of Pleas.

Form of particulars.

Between

*Charles Mildred and } Plaintiffs,
Thomas Mildred . . }*

and

Edward Thompson . Defendant.

The following are the particulars of the plaintiffs' claim under the common money counts of the declaration:

[state items with dates]

£ : :

[State particulars also of credits, if any, thus] :—

The plaintiffs give the defendant credit for the sum of £——, of which the following are the particulars :

£ : : £ : :

Balance due . . . £ : :

The plaintiff also seeks to recover the above balance on an account stated.

Dated the first day of March, A.D. 1856.

Yours, &c.

To Mr. R. C.

F. E.

Defendant's attorney.

Plaintiffs' attorney.

When the writ has been specially indorsed, it is usual to state as the plaintiff's particulars, that they are such as are indorsed on the writ.

The plaintiff may declare immediately the defendant has appeared ; this is done by delivering the declaration to the defendant, if he appears in person, or his attorney if by attorney. He has also until the end of the term

Time for declaring.

Notice to de-
clare.

next after appearance to deliver his declaration, and he may deliver it at any time of the year except between the 10th of August and the 24th of October.^u Should he neglect to declare beyond this time, without obtaining leave for further time, the defendant is at liberty to deliver him a notice to declare within four days, and then if this time should expire without his declaring, the defendant may have judgment of *non pros.*^x

The defendant, however, is not obliged to do so, and should he not, the plaintiff may declare at any time within twelve months from the service of the writ; if, however, he neglects to declare for twelve months from the *service* of the writ, even if he is prevented from doing so by some rule or order, the cause will be deemed out of Court.^y

In case of the death of any of the parties, when the action might be proceeded with by entering a suggestion^z on the roll of such death, the defendant or person against whom the action may be continued may apply by summons^a to compel the person entitled to proceed to do so, and in default he may enter a suggestion^b thereof and of the representative character of the person by or against whom the action may be proceeded with, and may have judgment for the costs of the action and suggestion against the person so entitled to proceed.

Notice to
plead.

Either together with the declaration, or separately, the plaintiff should deliver to the defendant a notice to *plead in eight days*, which will entitle him to the judgment of *nil dicit* at the expiration of such time, if the defendant has not pleaded, and has not obtained further

^u See "Service of Proceedings," R. H. T. 1853, 161, *et seq. infra*.

Green, 24 L. J., Exch. 193.

^x "Judgment of Non pros.," *infra*.

^z See "Suggestion and Revivor," *infra*.

^y Common Law Procedure Act, 1852, s. 58; *Hodgson v. Mee*, 3 A. & E. 765; but see *Ross v.*

^a Common Law Procedure Act, 1854, s. 92. See 5 C. B. 474.

^b See "Entry of Suggestion on Roll," *infra*.

time to do so. The notice to plead, when indorsed on the declaration, is in this form:—

The defendant is to plead hereto in eight days, otherwise judgment.

F. W. plaintiff's attorney.

If delivered separately, it must be entitled in the Court and cause, and dated and addressed to the defendant or his attorney, as every other notice is. Should the plaintiff not sign judgment, nor take any other proceeding for four terms, the defendant will be entitled to a month's notice of the plaintiff's intention to proceed.

In preparing the declaration, and the same may also be said of the defence, it frequently becomes a matter of great importance to ascertain facts that are exclusively within the knowledge of the opposite parties, and also to obtain an inspection of documents in their possession. Until recently, the Courts of law had no power of compelling discovery of facts, and only in a very limited class of cases the inspection of documents. There were, however, certain cases in which, even at common law, they had power to order the inspection of documents, but these were almost limited to the cases where the possessor of the instrument held it as a trustee for the party requiring the inspection.^c In all other cases the party was obliged to file a bill in Equity for a discovery.

Inspection and discovery at common law.

However, by the 14 & 15 Vict. c. 99, s. 6, it was enacted, that in any action or other legal proceeding in the Superior Courts of Law, such Court or a judge might, on the application of either party, compel the opposite party to allow the party applying to inspect all documents in his custody or under his control relating to the action or other proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be stamped

14 & 15 Vict. c. 99, s. 6.

^c *Goodliff v. Fuller*, 14 M. & W. 4; see also 15 M. & W. 589; *Blogg v. Kent*, 6 Bing. 614.

in all cases in which a *discovery* might have been obtained *in Equity*.

Common Law
Procedure Act,
1854, s. 50.

This power was also made much more available by an enactment in sect. 50 of the Common Law Procedure Act, 1854, which enacts, that upon the application of either party to any cause or other civil proceeding in the Superior Courts, upon an affidavit of his belief that any document to the *production of which* he is *entitled*, for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents they have in their possession or power relating to the matters in dispute, or what they know as to the custody they or any of them are in, and whether they object, and if so, upon what grounds, to the production of such as are in their possession or power.

Extent of the
powers.

The first of these powers is therefore co-extensive with the power of obtaining discovery by a bill in Equity, and the second extends to the case of all documents which the party would be entitled to the production of either at common law or by a bill in Equity.

The whole of these powers are confined, first, to the case of documents relating to matters arising in the action or other proceeding, and, secondly, to such as are material in supporting the case of the party making the application; and he has no right either to the discovery of or the inspection of any documents that are material to the cause by reason only^d of their supporting the case of the opposite party. Whatever is material, however, to support his own case he may have, whether it ex-

^d Wigram on Discovery; *Attorney-General v. Corporation of London*, 12 Beav. 8; 19 L. J., Ch. 314; *Riccard v. Inclosure Commissioners*, 24 L. J., Q. B. 49; *Rayner v. Collinson*, 21 L. J., Q. B. 68, 70.

poses that of his adversary or not.^e These powers go only so far as to assist a party in making good his own case, but not in exposing that of his opponent; and the affidavit should show what the gist of the proceeding is, and that the party applying has a good case on the merits, and also how the documents are material in supporting his case.^f

By sect. 58 of the Common Law Procedure Act, 1854, power is given to the Court or a judge to order that either party or his witnesses, or the jury, may inspect any real or personal property, the inspection of which may be material to the proper determination of the matter in dispute, and such inspection by the jury is to be governed by the rules applying to the case of a view by a jury under sect. 114 of the Common Law Procedure Act, 1852.^g

Common Law
Procedure Act,
1854, s. 58,
inspection of
property.

In addition to the above powers to compel discovery relative to documents, a much more extensive power has been given to obtain information from the opposite party, by the delivery of written interrogatories and otherwise. The Common Law Commissioners in their second Report, in recommending that such power should be granted by the legislature, observe, that such a power would tend to expose the motives of groundless actions brought for vexation, and of unfounded defences set up and persisted in for delay, and that it would, moreover, have a wholesome effect in preventing false pleas from being put on the record, for as soon as the examination of the party had made manifest the falsehood of the plea, a judge might be applied to, to disallow the pleading.

Interroga-
tories.

In consequence of this report, the legislature, without giving the parties to the suit a right to interrogate to the great extent contemplated by the commissioners in

^e See cases note ^d, *supra*; also
Scott v. Walker, 1 C. L. R. 944;
Coster v. Baring, 2 C. L. R. 811.

^f *Sneider v. Mangino*, 7 Exch.
229, 236.

^g Reg. Hilary Term, 1853, r. 48,
49, *infra*.

Interrogatories.

their recommendation, granted by the Common Law Procedure Act, 1854, very large powers of interrogation, at the same time leaving the extent to which this should be allowed in the discretion of those conversant with the practical working of such proceedings. These powers are not, however, expressly limited to those cases in which discovery might be obtained in Equity, and an opinion, that they may even go further, has been expressed in one case.^h The following are the principal sections of the act upon the subject.ⁱ

Common Law
Procedure Act,
1854.

Sect. 51. In all causes in any of the Superior Courts, by order of the Court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the Court or a judge may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which *discovery* may be *sought*, and require such party, or in the case of a body corporate any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the Court or a judge shall allow, shall be deemed to have committed a contempt of Court, and shall be liable to be proceeded against accordingly.

Sect. 52. The application for such order shall be made

^h *Martin v. Hemming*, 10 Exch. 478, 698.

ⁱ In connection with these extensive powers should be mentioned the powers given to the Courts of Law, and, when they are not sitting, to a judge, by s. 42 of the 15 & 16 Vict. c. 83

(Patent Law Amendment Act), to order an *injunction*, *inspection* or *account*, upon the application of either party, in an action for the infringement of letters-patent. See *Shaw v. Bank of England*, 22 L. J., Exch. 210

upon an affidavit^k of the party proposing to interrogate, and his attorney or agent, or in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and if the application be made on the part of the defendant that the discovery is not sought for the purpose of delay; provided that, where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, the Court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

Interrogatories.

The affidavit.

Sect. 53. In case of omission without just cause to answer sufficiently such written interrogatories, it shall be lawful for the Court or a judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct before a judge or master; and the Court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such Court or judge shall seem just.

Oral examination.

Sect. 55. Whenever, by virtue of this act, an examination of any witness or witnesses has been taken before a judge of one of the Superior Courts, or before a master, the depositions taken down by such examiner

^k See *Crooms v. Morrison*, 2 Jur. (N. S.) 163.

Interrogatories. shall be returned to and kept in the master's office of the Court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used, in the same manner as in the case of depositions taken under the hereinbefore mentioned act, passed in the first year of the reign of his late majesty King William the Fourth.¹

Special report of oral examination.

Sect. 56. It shall be lawful for every judge or master named in any such rule or order as aforesaid, for taking examinations under this act, and he is hereby required, to make, if need be, a special report to the Court in which such proceedings are pending, touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is hereby authorized to institute such proceedings and make such order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the Court.

Extent of power to interrogate.

In preparing the interrogatories, the same rules must be observed as in the examination at the trial;^m and although as a rule they will be confined to such matters as support the case of the party interrogating, this is not always so, as a defendant in ejectment may interrogate as to the pedigree of the plaintiff;ⁿ the ground being that, as in the present action of ejectment it is not necessary, as in the old actions for the recovery of land, to set out the title upon which the plaintiff claims, it is but reasonable that the same information should be obtained by other means.^o Neither party will, however, be allowed to interrogate merely for the purpose of prying into or exposing his adversary's case,

¹ By cap. 22, sect. 4, power is given to have witnesses in the cause examined on interrogatories before the trial; this is in general resorted to if the witness from any cause will not be able to attend the trial.

^m Alderson, B., in *Osborn v. London Dock Company*, 10 Exch. 698.

ⁿ *Hitchcroft v. Fletcher*, 2 Jur. (N. S.) 191.

^o See also *May v. Hawkins*, 1 Jur. (N. S.) 600.

although if the matters upon which he seeks information advance his own case, it will be no good ground of objection to them that they also expose the case of the other side.^p A party may, however, object to give an answer to interrogatories, upon his own affidavit that his so doing might criminate him; this is, however, no objection to delivering the interrogatory.^q

^p *Whately v. Crawford*, 2 Jur. (N. S.) 207; *Carew v. Davies*, 2 Jur. (N. S.) 207.

^q *Osborn v. London Dock Company*, 10 Exch. 698; 1 Jur. (N. S.) 93.

CHAPTER IX.

MODERN PLEADINGS: SECOND,

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WHEN the declaration has been delivered, the defendant has to consider his answer, and for this purpose he has in general eight days. However, he is not obliged to do so in that time, unless the plaintiff has given him notice to plead.

The defendant's answer to the suit must be either a *plea* or a *demurrer*. Strictly speaking, perhaps a demurrer ought not to be called an answer, for it amounts rather to an assertion that there is nothing to answer.

Pleas are divided into two classes, differing widely and essentially from each other, namely, into pleas *dilatory* and pleas *in bar*, or according to the language of the civil law, *exceptiones aut perpetuæ et peremptoriæ aut temporales et dilatoriæ sunt*. Pleas, dilatory and in bar.

Dilatory pleas are such as are founded upon some preliminary objection to the cause being entertained. They do not answer the declaration. And as will be seen from their very nature, they must be pleaded in the first instance, if at all, and they are waived by any answer to the declaration. Dilatory pleas.

They are of two kinds; first, pleas denying that the Court has jurisdiction to entertain the suit, these are called *pleas to the jurisdiction*; secondly, *pleas in abatement*, which disclose some ground for abating or quashing the writ and declaration without making any answer to the cause of action. The general ground of these pleas is either the *non-joinder* of parties who should have been joined in the suit as co-plaintiffs or co-defendants, or the *mis-joinder* of others who ought not to have been made parties.^b Two kinds—
To the jurisdiction.
In abatement.

It may here be mentioned that formerly, if the plaintiff or defendant in the action died pending the proceedings, the action *abated*. This rule was, however, repealed by sect. 135 of the Common Law Procedure Act, 1852; and by sects. 137, 138, a mode of proceeding by an entry on the proceedings of a *suggestion of the death* may be made in the case of the death of a plaintiff, by his legal representative, and in case of the death of the defendant, by the plaintiff. A similar suggestion Death of parties abatement of action.

Suggestion on the roll.

^b See Part 2, "Parties to Actions;" also the admirable introduction to Lush's Practice upon this subject, which in fact may be said to be the only complete treatise on the subject.

Suggestion on
Roll.
—

is to be made, also, in the case of the death of one or more of several plaintiffs or defendants. (See 2 Wms. Saunders, 74 k.) If the death takes place before or during the time of pleading and before the trial, the suggestion may be made a part of the declaration or other pleading, or may be delivered separately, and it may be pleaded to and issue joined thereon, and tried with the other issues, if any, or by itself.

In case the death should take place after verdict and before judgment, judgment may be signed at any time within two terms^c after the verdict without creating error in the proceedings.

Marriage,
sect. 141.

So, again, by section 141, in the case of the marriage of a woman plaintiff, or defendant, the action is not to abate, but may go on to judgment; and in case the woman was plaintiff her husband may issue execution, and if she were defendant, execution may issue against her alone, or her husband may be made a party to the record by a suggestion or writ of revivor, and execution issue accordingly.

Bankruptcy,
sect. 142.

It is also enacted by section 142 of the same Statute that the bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors shall not be pleaded in bar unless the assignees shall decline to continue and give security for costs, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order.

Pleas to the jurisdiction and in abatement have always been regarded with disfavour; and for this reason, four days only are allowed for pleading them; the latter must also be verified by affidavit. If either of these points are disregarded, the plea will be a nullity.^d

A plea to the jurisdiction must be pleaded in person;

^c Common Law Procedure Act, 1852, s. 139; 17 Car. II. c. 8, s. 1.

^d *Branden v. Payne*, 1 T. R. 689; *Lovell v. Walker*, 9 M. & W. 299.

so, also, must a plea of defendant's coverture and nonjoinder of her husband; infancy, also, when pleaded in abatement, must be pleaded by guardian.^f

Analogous to the plea to the jurisdiction is the *claim of cognizance*, made sometimes by an inferior Court of Record, having the franchise to entertain pleas in such case. This claim is made by the Court having such franchise, but it is generally made at the instigation of the defendant. The Universities of Oxford and Cambridge enjoy this privilege in the case of personal actions against the scholars and privileged persons of the University.^g

If the defendant cannot dispute the jurisdiction nor plead in abatement, or if he has done so unsuccessfully, or the objection raised by the plea in abatement has been removed by amendment,^h he must then apply himself to the declaration. In the first place, if the declaration or any count of it is framed irregularly, or in such a manner as to prejudice and embarrass the defendant in answering it, or if the particulars delivered with it are insufficient, the defendant should apply to a judge at chambers, or in very important cases to the Court, to have the objection removed. In case there is no objection of this kind, or it has been removed, the defendant must then either *plead in bar* or *demur*. A plea in bar is one that sets up an *answer* to the *cause of action* alleged in the declaration. A demurrer is a denial that the declaration, admitting it to be true, discloses any cause of action at all.

Application to strike out or amend counts.

Plea in bar and demurrer.

Every count of the declaration must be regarded for the purposes of pleading as a complete declaration in itself, and each one must be completely answered. The

^f When *infancy* and *coverture* may be pleaded *in bar*, see p. 125.

Thornton v. Ford, 15 East, 634.

^g 3 Bl. Comm. 83, 298; 1 Ld. Raym. 342; Lit. Rep. 304; 10 Mod. 126; 2 Ld. Raym. 836;

^h See p. 95; also Part 2, "Amendment in Case of Misjoinder, Nonjoinder," &c.

Plea in Bar
and Demurrer.

defendant may plead to some and demur to others, and if he has the same defence to plead to several counts, he may, when it will not produce confusion and embarrassment, plead to them jointly.

It is sometimes a matter requiring great judgment and discretion to determine whether the defendant should plead or demur to a count; for the demurrer, whilst it denies the validity of the count, does not dispute the truth of the facts. It is laid down as a general rule by Lord Coke,ⁱ that one should never rely upon a point of law when the facts are in his favour. However, by leave of the Court or judge, the defendant may plead and demur together to the same count, and this leave will generally be granted when the justice of the case requires it.^j

Pleas in bar,
four kinds.

Pleas in bar are of four kinds: traverses, pleas in confession and avoidance, pleas in estoppel, and pleas of defence upon equitable grounds.^k

1. A traverse.

A *traverse* is a denial of the truth of the count either in part or entirely. In order to constitute a good plea, it must deny some fact material to the cause of action. All traverses operate as a denial that the alleged cause of action ever existed. They are divisible into two classes.

Divisible into
two classes.

a. Pleas that deny the original right of the plaintiff and the obligation or duty of the defendant which forms the basis of the cause of action, in other words, pleas that deny some fact^l upon which is founded the original

ⁱ See *Brahmah v. Roberts*, 1 Bing. N. C. 483, judgment of Tindal, C. J.

^j As to what pleas may be pleaded together, and as to obtaining leave to plead several matters, see Part 2, "Pleading several Matters."

^k This division is perhaps not strictly logical, as some of the pleas of equitable defence will be found to fall occasionally under the other heads as well. How-

ever, these pleas form practically so entirely different a class of defences from the others in substance as well as in pleading, that it has been thought best arbitrarily to adopt this classification for convenience sake.

^l Where the defendant disputes the obligation, even assuming the facts stated to be true, he then *demurs* to the count. See "Demurrer," p. 128.

obligation of the defendant to do or abstain from doing that for the neglect or commission of which the action has been brought. For example, first, in actions *ex delicto*, as in an action for obstructing the plaintiff's right of way, or for obstructing an ancient light or other easement, *a denial of the right*; or for an injury to plaintiff's goods, a denial that they are the plaintiff's property; or for slander of the plaintiff in his profession, a denial of his being in such profession; and, secondly, in actions *ex contractu*, a denial that it was ever agreed as alleged; or that the defendant was ever indebted as alleged; or a denial of *performance* of a condition precedent by the plaintiff, or the denial of the *happening* of any condition precedent as alleged in the count.^m

Traverses.

b. Pleas that deny the infraction of the right or the breach of duty or obligation on the part of the defendant, for example, first, in actions *ex delicto*, such as the above cases, a denial that the defendant obstructed the way or the light, or a denial that he used the slanderous words alleged, or that he used them in the sense imputed, or again, a denial that he, in fact, injured the goods. And, secondly, in actions *ex contractu*, a denial of the breach by the defendant.

The general rule is, that a traverse should be in terms of the allegation, converting the proposition into a negative; for example, *that the defendant had not due notice of dishonour of the said bill as alleged, or that the plaintiff is not executor as alleged*; or where it is a denial of the performance of some condition precedent not *expressly* set out in the count, but contained only in the allegation of the performance of conditions precedent generally, in such case the plea must specify the condition precedent and traverse it.ⁿ

Forms of
traverse.

^m See p. 122, "Pleas alleging no Notice of Action," &c.

ⁿ Section 57 of the Common Law Procedure Act, 1852, autho-

rizing the averment of *performance* of conditions precedent generally, does not extend to the averment of the *happening* of all events that

Common forms
of traverse, or
general issue.

There are certain traverses in daily use that the defendant is at liberty to plead in certain *common forms*, to which a particular value and effect is assigned. These are called the pleas of the *general issue*. They are named as follows: *non assumpsit*, *non est factum*, *nunquam indebitatus*, *non detinet*, *non cepit*, and *not guilty*, the first three belong to the first class of traverses, the rest to the second. Their value and effect is as follows:—^o

Non assumpsit.

Non assumpsit is applicable to all actions of simple contract, except *indebitatus assumpsit* and *debt* on simple contract, to which the general issue is *nunquam indebitatus*, and except also actions on bills or notes, to which no plea of the general issue is allowed, and it operates as a denial only of the fact of the defendant having entered into such a contract as that alleged in the count, or of the facts from which such contract might be implied by law.

Non est factum.

Non est factum is the general issue in actions on deeds, and it operates as a denial only of the *execution* in point of fact by the defendant of such a deed as that alleged in the count.

Nunquam indebitatus.

Nunquam indebitatus is the general issue in actions of *indebitatus assumpsit* and *debt* on simple contract. This plea operates as a denial of those matters of fact from which the liability of the defendant arises. This plea

are conditions precedent, according to Maule, J. (case at chambers, MSS.). Where, therefore, the happening of events are thus generally averred, as is very much the practice, the defendant may apply to have the declaration made more explicit, in order that he may the more easily traverse the fact he desires to dispute.

^o Formerly the pleas of the general issue were much more extensive in what they denied than at present. Their present value

is defined by the Rules of Pleading of Trinity Term, 1853. See Reg. Trinity Term, 1853, *infra*.

With the exception of non assumpsit, the pleas of the general issue have but one form; this, however, is expressed in several ways according to the contract that is denied. Thus it may be that the defendant *did not promise*, or *did not agree*, or *did not warrant*, or *it was not agreed*, as alleged. See Part 2, "General Issue."

belongs to the first class of traverses, and thus denies that the defendant ever owed the money, and in support of this, it is not sufficient to show only that the defendant did not owe the money *at the time the action* was brought, as all matters in discharge of the debt must be pleaded specially; the plea of *nil debet*^p being no longer allowed except in such penal actions^q as come under the statute 21 Jac. I. c. 4.

Non detinet is the general issue in *detinue*, it operates merely as a denial of the detention. Non detinet.

Non cepit is the general issue in *replevin*, it operates simply as a denial of the taking. Non cepit.

Not guilty is the general issue in all actions *ex delicto*, except replevin; it is a traverse of the second class, and operates as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, but not of the plaintiff's right or position in any way; thus, in an action for trespass to land, it operates as a denial of the fact of the breaking and entering, but not of the land being the plaintiff's close; in actions for an injury to, or a conversion of, the plaintiff's goods, it operates as a denial of the fact of the injury or conversion, but not of the plaintiff's property in the goods; so, again, in an action of slander, it denies the speaking the words, of speaking them maliciously and in the defamatory sense imputed, and that they were spoken with reference to the plaintiff's office, profession or trade, but not of the plaintiff's holding such office, or being in such trade or profession.^r Not guilty.

In all other cases, the matter of fact to be denied must be singled out and expressly traversed.

^p Reg. Gen. Trinity Term, 1853, r. 11.

4 M. & W. 375; *Faulkener v. Chevel*, 10 A. & E. 76, 632.

^q In these are included actions under 11 Geo. II. c. 19, s. 4, for the fraudulent removal of goods to avoid a distress. *Jones v. Williams*,

^r See Part 2, "General Issue;" also Reg. Trinity Term, 1853, *infra*.

2. Pleas in confession and avoidance.

Divisible into two classes.

a. Pleas that show there never was a cause of action. As in actions *ex delicto*, pleas in justification or excuse.

In actions *ex contractu*.

Pleas in *confession and avoidance* of the count are such as admit the truth of all that is stated therein, but disclose further facts that destroy its effect. These pleas are very numerous and a great variety of them occur daily in practice. They are divisible into two well-marked classes, namely, into such as show—

a. That the alleged *cause of action* never existed.

b. That if the *cause of action* ever had any existence, it has *since* then and before the commencement of the suit been *discharged*, or the right to bring the action barred.

The first class consists of those pleas which show:—

In actions *ex delicto*,—

That the defendant's conduct was *justifiable* or *excusable*; of which the ordinary examples are as follows. In *trespass quare clausum fregit*; the pleas of *liberum tenementum*, of *rights of way*, common and other rights, leave and licence, entry by virtue of a writ, and some others. In *trespass de bonis*; pleas of distress for rent or damage feasant, or under legal process, or that the animal destroyed was a dangerous animal and in the act of destroying life or property. In *trespass to the person*; pleas of *son assault demesne*, *i. e.*, that the defendant committed the assault in self-defence; assault committed in defence of father or mother, or a helpless person; that plaintiff was trespassing on defendant's premises, and defendant *molliter manus imposuit* and pushed him out with no more than necessary force; *molliter manus imposuit* to preserve the peace; correction of an apprentice or seaman; probable cause for suspecting felony by plaintiff; justification under legal process. In *case* for slander; that the words were true, that the defendant merely repeated them, privileged communication. In *replevin*; avowry or cognizance for rent, distress damage feasant, and some others.

And in actions *ex contractu*,—

That the contract was *void ab initio*, upon the ground

of illegality, fraud, duress or the like,^s or that after the contract was made, and *before breach*, it was altered or rescinded by mutual consent, or that being a voidable contract it was avoided, or that it became illegal to perform, or that the plaintiff accepted an altered and modified performance as and for performance, or that the plaintiff waived the performance and discharged the defendant therefrom, or that certain circumstances occurred that took away the plaintiff's right to the fulfilment or further performance of the contract, and released the defendant therefrom; with the exception of the last, none of the above-mentioned pleas require more particular exemplification: of the last, a good example is to be found in the plea to an action for breach of promise of marriage, that the defendant discovered that the plaintiff was a person of infamous character, and therefore broke off the engagement;^t and also the plea to an action by a servant against his employer for not continuing him in his service according to his agreement, that the servant had been guilty of misconduct.^u

Confession and
Avoidance.

The second class of pleas, in confession and avoidance of the count, are such as show that the alleged cause of action, if it ever did exist, has since then and before the commencement of the suit been either *discharged* or the plaintiff's right to sue thereon barred; of these the examples in the ordinary practice are the pleas of payment,^x tender with payment into Court,^y set-

b. Pleas that show that the cause of action has been discharged or barred.

^s See *Collins v. Blantern*, and notes, 1 Smith's Lead. Cas.

^t See plea of this kind, *Young v. Murphy*, 3 Bing. N. C. 55.

^u See Part 2, "Precedents," and *Cooper v. Whitehouse*, 6 C. & P. 545. And as to a plea for dismissing a surgeon's assistant, *Wise v. Wilson*, 1 C. & K. 662.

^x Payment by whom and to

whom to be made, *Bennison v. Thelwall*, 7 M. & W. 512; *M'Intyre v. Miller*, 13 M. & W. 725; *Watters v. Smith*, 2 B. & Ad. 889; *Farrer v. Hutchinson*, 9 A. & E. 641.

^y See p. 125, n¹, and Part 2, "Tender;" Com. Dig. "Tender;" *Hesketh v. Fawcett*, 11 M. & W. 356; 1 Wms. Saund. 33, n. 2;

off,^z judgment recovered, release, accord and satisfaction, merger in a higher security,^a defendant's discharge under Insolvent Act, bankruptcy of defendant and receipt of his certificate, Statute of Limitations,^b bankruptcy of plaintiff, negotiable instrument given for debt^c and not yet mature, no notice of action given,^d no signed bill of costs given by attorney or solicitor.

3. Pleas of estoppel.

Pleas by way of *estoppel* are rather unusual pleas. They are founded in a rule of law which forbids a person to assert or deny a particular fact, as the case may be, when his so doing would contradict either certain antecedent conduct of his own, or some facts by which he is in law bound. For example, where two or more parties enter into a deed they are bound as between themselves by all the recitals of facts therein, and cannot, in general, call them in question, however untrue they may be. Estoppel is of three kinds, namely, estoppel by matters of *record*, estoppel by *deed*, and estoppel by matter *in pais*, that is, by the conduct of the party.^e Pleas of estoppel neither traverse any fact nor confess and avoid the declaration, they merely disclose the circumstances constituting the estoppel, and thus show that the opposite party has no right to make a certain material allegation or traverse.

These pleas are not of frequent occurrence in practice, as it happens more often that the estoppel may be taken advantage of without being specially pleaded, thus the pleading may be demurred to when the estoppel appears on the face of the pleadings, and in numerous other cases the question only arises upon the evidence.

tender must be unconditional. *Jennings v. Major*, 8 C. & P. 67.

^z 2 Geo. II. c. 22; 8 Geo. II. c. 24, s. 4. Set-off only of liquidated damages, *Williams v. Flight*, 2 Dowl. N. S. 11; and can only be pleaded to an action for liquidated damages, *Thompson v. Red-*

man, 11 M. & W. 487.

^a See p. 56, "Merger."

^b See p. 67, "Statutes of Limitation."

^c *Lamb v. Pegg*, 1 Dowl. 447.

^d See p. 66, "Notice of Action."

^e See Part 2, "Estoppel."

Pleas of *defence upon equitable grounds* are of recent introduction. They were first authorized by the Common Law Procedure Act, 1854.

4. Pleas of equitable defence.

The object of thus introducing defences hitherto unknown to the law, was to remedy, so far as the machinery of the Courts of Law would admit, that circuitry of litigation which frequently arose by reason of the recognition, by the Courts of Equity, of rights that the Courts of Law had no power to take into account.

Cases were of frequent occurrence in which the plaintiff had a complete cause of action, and to which there was no defence in law, whilst at the same time there were circumstances in the case, which would enable the Court of Equity to protect the defendant and deprive the plaintiff, either entirely or conditionally, of the benefit of the judgment at law.^f

By the Common Law Procedure Act, 1854, s. 83, it was enacted, that a defendant in any action,^g and a plaintiff in replevin, whenever he would be entitled to relief in equity against the judgment, if obtained against him at law, might plead by way of defence upon equitable grounds the facts which would so entitle him to relief in equity.

The equitable plea, however, will only be admissible in such cases as, having regard to the machinery of the Courts of Law and the forms of the proceedings therein, complete justice can thereby be done between the parties. In all cases, therefore, where the defendant will be only entitled to such a modified relief as cannot be properly dealt with by a Court of Law, he will still have to resort to a Court of Equity, and, indeed, some of the few decisions in the Courts of Law upon this subject have gone so far as to say, that no equitable plea will be good unless it discloses facts which would entitle the defendant to an unconditional relief in equity.^h

^f See Mayne on Equitable Defences.

cluded. *Neave v. Avery*, 1 Jur. (N.S.) 575.

^g There being no pleadings in ejectment, the action is not in-

^h *Mines Royal Society v. Magnay*, 10 Exch. 489; *Steele v. Had-*

Defences after
commence-
ment of action.

The defendant's plea to the suit must, in order to terminate it entirely in his favour, disclose a defence that existed before the action was commenced, that is to say, before the original date of the writ.

Pleas to the
further main-
tenance of the
suit.

In case, however, any matter of defence should arise after writ issued and before plea pleaded, the defendant may avail himself of it as a *plea to the further maintenance of the suit*. Such plea may be pleaded alone or together with a plea, containing a defence that arose before action. All pleas of matter arising after action commenced must state the fact; as any plea, not stating when the defence arose, will be deemed a plea of matter arising before action.ⁱ Should the defendant plead such a plea, the plaintiff will be at liberty to confess it, and will be entitled to his costs up to that time.

Pleas to the further maintenance of the suit may be *dilatory* or *in bar*, as the case may be.

Payment of
money into
Court.

One plea in bar of this class is, however, peculiar, and this is a plea of *payment of money into Court*, which may be called a plea in *confession* and *satisfaction*, and it may be pleaded to a part or to the whole of the plaintiff's claim. It cannot, however, be pleaded at all in actions for assault, false imprisonment, libel,^j slander, malicious arrest or prosecution, crim. con. or debauching a daughter or servant. This plea operates as a confession that there is a cause of action, but not necessarily *the* cause of action, unless the declaration is specific.^k This must, however, be distinguished from the plea of

dock, 10 Exch. 643; *Woodhouse v. Farebrother*, Q. B.; 1 Jur. (N. S.) 998; but see *Chilton v. Carrington*, 16 C. B. 206. See generally on the subject of equitable pleas, Mayne on Equitable Defences.

ⁱ Common Law Procedure Act, 1852, s. 58.

^j Except indeed for a *libel in a newspaper*; in which case the defendant may pay money into Court

as compensation, if he pleads that the libel was inserted without actual malice or gross negligence, and that he apologised for it. 6 & 7 Vict. c. 96, s. 2.

^k *Kingham v. Robins*, 5 M. & W. 94; *Story v. Finnis*, 6 Exch. 123; *Schreger v. Carden*, 11 C. B. 851; *Robinson v. Harman*, 18 L. J., Exch. 202. See Part 2, "Payment into Court."

tender,¹ with the *payment of money into Court*, which is strictly a plea in bar of the action.

Any matter of defence arising at any stage of the action between plea and verdict, may, at any time within eight days of the time it arose, be pleaded as a *plea puis darrein continuance*, signifying, according to the old practice, a defence that has arisen since the last continuance. Should it be pleaded at the trial, it is pleaded to the judge and not delivered to the other side; it is then entered on the record, and the trial put an end to; the plea is then replied to in the ordinary way and the action again proceeded with; it may be pleaded even after the jury have retired to consider their verdict.

Plea puis darrein continuance.

Independently of the foregoing division, pleas are spoken of as *issuable* and *non-issuable*. An issuable plea is one really offering an answer to the action on its merits, and not merely a dilatory plea or one on technical grounds. A plea, in order to be issuable, need not necessarily be a good plea,^m but it must be such that a decision either upon a demurrer thereto, or upon an issue of fact raised thereupon, would determine the action upon its merits.ⁿ All dilatory pleas are *non-issuable*; but a plea of the Statute of Limitations, and also the pleas of infancy and coverture, when pleaded in bar, are issuable; these two pleas are in bar when they show that the contract, in the first case, is not binding, and in the second void, because of the defendant's infancy or coverture at *the time when the alleged contract was entered into*; they are in abatement only when they show that the defendant in the first case cannot be sued because he is an infant, and in the second, that the defendant

Pleas are issuable and non-issuable.

¹ In order to make the plea of tender good for anything, the defendant must have tendered the money and have been always *ready and willing, tout temp prist*, and be still ready and willing, *uncore prist*, to pay. 1 Wms. Saund. 33, n 2.

^m *Steele v. Harmer*, 14 M. & W. 139.

ⁿ *Mackay v. Wood*, 7 M. & W. 420; *Staples v. Hollingsworth*, 4 Bing. N. C. 144; *Humphreys v. Waldegrave*, 6 M. & W. 622.

has married, and her husband should have been joined with her.

Formerly only
one plea al-
lowed.

By the ancient practice of pleading, a defendant was allowed a single answer only to each cause of action; the principle upon which this rule was founded being, that, as one defence if good and true was sufficient, the defendant could have no occasion for more.

In no state of society could such a principle have been safe. And as a fact, it frequently led to gross failure of justice. Such a rule could only have originated in those days of general ignorance and sentimentalism, when even the intelligent and learned in their day believed in that engaging, though unhappily deceptive, doctrine, of the absolute and universal demarcation between the *true* and *untrue*, and of there being something characteristic about the really true that made it at once distinguishable from the untrue.^o

Certain pleas
now allowed.

This rule has, however, long been relaxed,^p and at the present day the defendant is allowed, as a matter of course, to plead certain pleas together to the same count, and, with leave, he may plead any pleas together, or may plead and demur together. But should he without leave plead together more than those allowed, the plaintiff may treat the whole as a nullity.^q

Together as of
course.

The following pleas may be pleaded together, as of course, and without leave^r:—

Non assumpsit or Nunquam indebitatus.

Tender as to part.

^o Let not the learned reader suppose that the writer confounds the *true* and the *untrue* with *truth* and *falsehood*. He fully recognizes that one might be telling the truth and be afterwards disappointed to find that what he had stated was untrue, and, on the other hand, one might be designing to mislead, but be unconsciously and unknowingly stating what was in fact really true,

which would not of course make his statement less a *falsehood*.

^p 4 & 5 Ann. c. 16, s. 4; Com. Dig. Pleader, E. 2; 32 Geo. III. c. 58; Tidd's Prac. 404; 1 Will. IV. c. 21.

^q Common Law Procedure Act, 1852, s. 86.

^r Common Law Procedure Act, 1852, s. 84.

Statute of Limitations.

Set-off.

Bankruptcy of defendant.

Discharge under Insolvent Act.

Plene administravit.

Plene administravit præter.

Infancy.

Coverture.

Payment.

Accord and satisfaction.

Release.

Not guilty.

Denial that the property, an injury to which is complained of, is the plaintiff's.

Leave and licence.

Son assault demesne.

Every plea must contain a complete answer to the count pleaded to,^s or at least to so much thereof as it is applied to,^t in cases where the cause of action is divisible.

Each plea must be a complete answer.

On the other hand, no single plea should set up two distinct defences to the same count.^u And as with the count, so it is also directed by the rules of pleading,^x that several pleas, replications or subsequent pleadings founded on the same ground of answer or defence shall not be allowed, provided that on application to have them struck out, the Court or judge may allow such as may appear proper for determining the real question in controversy between the parties on its merits.^y

Plea must not be double.

^s Co. Litt. 303 a; *Weeks v. Peach*, 1 Salk. 179; 1 Wms. Saund. 28.

^t 4 Rep. 62 a; *Market v. Johnson*, 1 Salk. 180.

^u Common Law Procedure Act, 1852, s. 67, and rule against *duplicity*, Part 2.

^x Reg. Trinity Term, 1853, r. 2.

^y As to what circumstances will induce the Court to allow other

pleas to be pleaded together, see Part 2, "Pleas." See also *Cooling v. Great Northern Railway Company*, 15 Q. B. 486; *Gardner v. Alexander*, 3 Dowl. 146; *Murray v. Boucher*, 9 Dowl. 537. See as to meaning of term *merits*, *Humphreys v. Waldegrave*, 6 M. & W. 622; *Mackay v. Wood*, 7 M. & W. 420.

Formerly, whenever a plaintiff declared upon any document, he made *profert* of it, that is, alleged that he brought it into Court, whereupon the defendant, if he required it, claimed *oyer* or sight of the document, and then pleaded accordingly. At the present day it is not necessary to make *profert*, nor can the defendant claim *oyer*: a party relying upon any document may set it out in his pleading, and if either party is in possession of documents relating to the cause of action, the other may obtain a rule or order to inspect them, and, if necessary, to take examined copies.

Further time
for pleading.

If the defendant is unable to prepare his pleas in time, he will, upon application, be allowed further time to plead; and this application, as well as an application to strike out or amend a count, operates as a stay of all further proceedings from the time the summons is attendable, until the day it is disposed of, including the whole of the last-mentioned day.

Upon certain
terms, as to
plead issuably.

When the defendant obtains further time to plead, it is upon certain terms; the *usual terms* are, that he shall plead *issuably, rejoin gratis, i.e.*, without notice, and *take short notice of trial*, if necessary.

Demurrer.

When the defendant, although he cannot deny the truth of the count, disputes that it shows a good cause of action, he *demurs*, and should the count be both untrue and probably bad as well, he should apply for leave to plead and demur together. The demurrer is very simple, and is always the same at whatever stage it may occur. It consists merely of a statement that the count or other pleading, as the case may be, is *bad in substance*. It is requisite, also, to specify in the margin, at least, one ground of demurrer to be argued.² The *demurrer* is so called at whatever stage pleaded, and whether by defendant or plaintiff, and the term demurrer is generally used, at the present day, in con-

² *Bonzi v. Stewart*, 7 M. & G. *Ross v. Robson*, 3 Dowl. 779. 746; *Lacy v. Umbers*, 3 Dowl. 732;

tradistinction of a pleading, although, in strictness, it is as much a pleading as any other. By the demurrer, the party admits the truth of the pleading demurred to; he may, however, with leave deny the truth of the pleading as well as demur to it.^a

Formerly, defects of mere form in the pleadings, as well as substantial errors, were open to demurrer, with this distinction, that no demurrer was allowed for an error of form unless the grounds of demurrer were *specifically* set forth therein.^b No demurrer is now allowed for mere formal defects; and in all demurrers it is requisite to state in the margin at least one ground of objection, although where no ground or one merely frivolous is stated, the demurrer will not be a nullity, it will be merely irregular and liable to be set aside.^c

The demurrer may at any time be withdrawn, but only on certain terms, which are, usually, to pay the costs and plead issuably at once.^d

The defendant's plea, understanding thereby his answer to the declaration, is divisible into four parts: the title of the Court with the date; secondly, the marginal title of the cause; thirdly, the commencement; and lastly, the body.

Parts of the plea.

The *title* is the same as in the case of the declaration, and, indeed, every pleading is entitled in the same manner.

The title.

In the margin of every pleading after the declaration, in the place of the venue, is the name of the cause, which in the pleadings of the defendant is written thus, *C. D. at suit of A. B.*, and the plaintiff's pleadings, *A. B. versus C. D.*

Name of the cause in the margin.

The *commencement* of the plea states simply that *the defendant*, without stating his name, either *in person* or

Commencement.

^a Common Law Procedure Act, 1852, s. 80; *Talbot v. Bulkeley*, 4 D. & L. 306; *Heginbotham v. The South-Eastern and Continental Steam Packet Company*, 8 C. B. 337.

murrers," p. 95, *supra*, and also under "Arrest of Judgment," *infra*.

^c See n. ², *supra*, and Part 2, "Demurrers."

^d *Underhill v. Harney*, 3 Dowl. 495.

^b See "General and Special De-

by his attorney or guardian, stating their name, says that, and here follows the substance of the defence, and there is no formal conclusion. Every plea must also be placed in a distinct clause, and numbered. In the case of a plea upon equitable grounds, it must be commenced "*For defence on equitable grounds.*"

The following will serve as an example of pleas in an action of assumpsit:—

Examples of
pleas.

In the Common Pleas.

To first count,
non assumpsit.

The 1st day of June, A.D. 1856.
Fry & another } The defendant, by E. B. his attorney,
ats. } says, as to the first count in the decla-
Taylor. } ration, that he did not promise as alleged.

Statute of Li-
mitations.

2. And for a second plea the defendant says, as to the said first count, that the alleged cause of action did not accrue within six years before this suit.

To common
counts, nun-
quam indebi-
tatus.

3. And for a third plea the defendant says, as to the residue of the declaration, that he never was indebted as alleged.

Payment.

4. And for a fourth plea the defendant says, as to the said residue of the declaration, that he satisfied and discharged the plaintiff's claim before action, by payment.

Set-off.

5. And for a fifth plea the defendant says, as to the said residue of the declaration, that the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim, for money lent by the defendant to the plaintiff, which amount the defendant is willing to set off against the plaintiff's claim.

Demurrer.

And as to the second count of the declaration the defendant says, that it is bad in substance.

*The ground of demurrer is, that the
alleged breach is no breach of the
contract set forth in that count.*

Particulars of
defence.

As it was with the declaration, so the defendant is required in certain cases to deliver particulars with the

pleas. Thus, in every case where there is a plea of Set-off. set-off in respect of any demands that would require particulars, if contained in a declaration, the defendant must deliver particulars of the set-off.

Again, in actions for infringement of patents, the defendant must deliver particulars of the objections he intends to take.^e Infringements of patents.

These particulars, likewise, form no part of the record, they merely confine the defendant in his evidence.

Either with or separately from the plea or demurrer the defendant should deliver to the plaintiff a notice to *reply* Notice to reply. *or join in demurrer in four days, otherwise judgment.*

Where several actions are brought against several defendants, in cases in which one action will decide them all, the Courts will, in certain cases, upon the application of the defendants, order the actions to be *consolidated*, and the plaintiff to proceed with one only, and the defendants to abide by the result of that. The cases upon this rule are by no means uniform.^f It seems, however, to be well established, that where several actions are brought against underwriters upon the same policy of insurance, they will be consolidated. The plaintiff, however, if he fail in one action, may go on to try another.^g Consolidation of actions.

In like manner, if a plaintiff commences several actions against one defendant for causes that might^h without inconvenience have been joined, the Court will order him to *join the actions* in one. Ordering joinder of actions.

^e 15 & 16 Vict. c. 83, s. 4 (Patent Act). See *Palmer v. Cooper*, 545, n. ^g *Long v. Douglass*, 4 B. & Ad. 545, n.

Palmer v. Wagstaffe, 9 Exch. 231. ^h See "Joinder of Actions,"

^f *Newton v. Belcher*, 9 Q. B. 612; Part 2.

Sharpe v. Lethbridge, 4 M. & G. 7.

CHAPTER X.

MODERN PLEADINGS—REPLICATION AND SUBSEQUENT PLEADINGS.

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Replication.

THE defendant having delivered his plea, it becomes the plaintiff's turn to reply, and this he must do, if the defendant has given him notice to do so, in four days, or he may obtain leave for further time, without any terms.^a

After plea in abatement.

If the defendant has pleaded in abatement, the plaintiff must, if the plea be true, apply for leave to amend his declaration, and in case a new defendant is added, the delivery of the amended declaration is as to him the commencement of the suit.

After plea to the action.

In the next place, if the defendant has pleaded to the declaration itself, the plaintiff will either *join issue*, or *traverse*, or reply in *confession and avoidance*, or by way

^a *Cruchley v. London and Birmingham Railway Company*, 2 D. & L. 102.

of *estoppel*, or upon *equitable grounds*, or he may *demur*, or if the defendant has paid money into Court, or pleaded any other matter that arose after action, he may confess the plea and take the money out of Court, or otherwise as the case may be. He may also, of course, abandon the action at any time, which may be done in various ways;^b it is also not an uncommon thing, when the defendant pays money into Court in respect of a part of the claim, for the plaintiff to take it in full discharge of the action, by entering a *nolle prosequi* or a *remittitur* for the residue.

In the first place, however, if the pleas are framed in any way contrary to the rules,^c the plaintiff may apply to have them struck out or amended, or, in certain cases, he may sign judgment, as for want of a plea.

Application to strike out or amend pleas.

Thus, if a plea is irregular, it will be ordered to be amended; and if tricky and calculated to perplex,^d or frivolous,^e it will be set aside, or if wholly false and intended merely to delay,^f it will also be set aside; and in certain cases, a plea may be treated wholly as a nullity, as where it is wholly irrelevant,^g such as a plea of *non assumpsit* to an action of trespass, or where it is absurd and palpably sham and fictitious,^h or containing merely an insolent remark, in which case it may also amount to a contempt of Court, or where the defendant being under terms to plead in a particular manner, disregards them, or where he pleads together, without leave, several pleas that he has no right to, or where a plea is applied to one part only of the count, and constitutes, in fact, no answer to the residue, and such

Signing judgment as for want of a plea.

^b See "Judgment," "Discontinuance," "Nolle Prosequi," "Retraxit," *infra*.

E. 19.

^c See Rules of Pleading, Part 2.

^f *Body v. Johnson*, 5 B. & C. 756.

^d *Mitford v. Finden*, 8 M. & W. 511.

^g *Bent v. Benyon*, 6 C. P. 217.

^h *Blewit v. Marsden*, 10 East, 237.

^e *Knowles v. Burward*, 10 A. &

residue is covered by no other plea,ⁱ the plaintiff may sign judgment for so much as is then left unanswered.^k

In like manner, a demurrer, if frivolous,^l or without a marginal note of the point of demurrer, will be set aside.^m

Issue must be joined on a traverse or demurrer.

Should the plea, however, not be open to any of these objections, the plaintiff must *reply* or *demur*. At this stage, two of the most important rules of pleading come first into operation, namely, the rule that upon a traverse or demurrer at any stage, issue must be joined; and the rule against departure; the first is designed to bring about an actual issue, the second, to prevent prolixity in the pleadings.ⁿ

Exceptions.

Upon a demurrer at any stage, the opposite party must either apply to have his pleading amended, by adding the material fact omitted, or he must join in demurrer; and where the pleading is amended, the opposite side has time to plead over again. Upon a traverse issue must, in general, be joined, with however this exception, that it may be demurred to as immaterial and bad in substance, or it may be answered by estoppel.

Joinder in demurrer and in issue.

The joinder in demurrer and the joining issue are extremely simple, and are the same, at whatever stage they occur; the joinder in demurrer consisting of the statement, that the declaration or count or plea, or otherwise, as the case may be, *is good in substance*; and the joinder of issue, that the plaintiff or defendant *joins issue upon the defendant's plea, or the plaintiff's replication*, or as the case may be.

Rule against departure.

The rule against *departure* is in principle this, that

ⁱ 4 Rep. 62 a; 1 Wms. Saund. 28, n.; *Henry v. Earle*, 8 M. & W. 228.

^k Where a plea professes to answer the whole, and constitutes in fact no answer to the whole the course is to demur.

^l *Daniel v. Lewis*, 1 Dowl. N. S. 542.

^m *Lacy v. Umbers*, 3 Dowl. 732; also p. 779, and 7 M. & G. 746.

ⁿ See Part 2, "General Rules of Pleading."

neither party in any subsequent pleading shall depart from or desert his original ground of complaint or answer and resort to another;^o one of the simplest examples of departure is the following, given by Stephen.^p In debt on a bond, conditioned to perform the covenants of a lease, one of which was, that the lessee at every felling of wood would make a fence, the defendant pleaded *that he had not felled any wood*, the plaintiff replied that he had felled two acres and made no fence; the defendant rejoined, that he *did make a fence*.^q this was a departure from the plea.

The plaintiff has only a right to one replication to each plea, unless by leave of the Court or a judge.^r In other respects the replication, and all subsequent pleadings, do not differ from the plea in principle.

One replication only to each plea.

In the case of a traverse, there is a common form of general traverse, which may be used in the replication or any subsequent pleading in every case, *e.g. the plaintiff joins issue on the defendant's first plea*, or a certain portion of the plea, specifying how much; and this form is deemed a denial of the substance of the plea or subsequent pleading, or of so much as is pleaded to, and an issue thereon. It need not, however, be resorted to unless the party likes. And in all cases where the plaintiff's pleading is a traverse, he may add a joinder of issue for the defendant.

General traverse.

^o *Richards v. Hodges*, 2 Wms. Saund. 84, n. 1; Com. Dig. Plead. F. 7, 11; Co. Litt. 304 a; Steph. 451.

^p Page 453.

^q The student may be reminded that such pleadings could only occur in an action on a bond where the plaintiff having sued on the bond itself, without setting out the condition, specifies the breaches in his replication. See n. ^r, *infra*; and Part 2, "Actions on Bonds."

^r To this there is, however, one exception, namely, where the plaintiff sues upon a bond within the statute 8 & 9 Will. III. c. 11, without setting out the conditions and breaches in the declaration. In such case he is entitled to several replications for the several breaches. This statute extends only to bonds with special conditions, and not to common money bonds nor replevin bonds. See *Smith v. Bond*, 10 Bing. 125.

Neither the replication nor any subsequent pleadings are numbered in the same manner as the pleas.

Example of replication.

The following will serve as an example of a replication :—

In the Common Pleas.

The twelfth day of July, A.D. 1856.

Traverse and joinder of issue.

Steard

v.

South

} *The plaintiff joins issue on the defendant's first, third and fourth pleas :*

Denial of deed.

And the plaintiff as to the second plea says, that the alleged release is not the plaintiff's deed :

Statute of Limitations to set-off.

And the plaintiff as to the fifth plea says, that the alleged set-off did not accrue within six years :

Taking money out of Court.

And the plaintiff as to the sixth plea says, that he accepts the said 100l. in full satisfaction and discharge of the claim of the plaintiff, in respect of the matter to which that plea is pleaded ; therefore, as to that part of the plaintiff's claim, he is satisfied.

Rejoinder.

The rejoinder and all subsequent pleadings follow the same rules as the replication, with the exception, that no pleadings upon equitable grounds can be advanced but in the plea or replication. It may also be stated that where the plaintiff has added a joinder of issue for the defendant, the latter may, upon the delivery of the issue, refuse to accept the joinder of issue. In such case he must give the plaintiff notice to that effect in a simple form, entitled in the Court and cause, and stating that he does not accept the issue, but intends to demur, or as the case may be ; and then he must do so within four days, or the plaintiff may sign judgment.

New assignment.

It occasionally happens that in place of the ordinary replication the plaintiff is obliged to reply by way of *new assignment*.^s This is in the nature of a supplement

^s The authorities upon this subject are scanty and unsatisfactory, especially when taken in conjunction with the changes that have

to, or a re-statement of, the declaration, where the latter has been ambiguous,^t and the plea has, in consequence, missed or evaded the true cause of complaint.

The new assignment is necessary whenever it happens that there are, *in fact*, several *primâ facie* causes of action, each of which would equally fit the declaration, and the defendant either answers one for which the plaintiff does not sue, and passes by that for which he really sues, or answers only some of those for which the plaintiff sues, and passes over others, as the declaration and the facts may be. When necessary.

Thus, suppose the declaration alleges a trespass, and there have been, in fact, two occasions, upon each of which there was *primâ facie* a trespass, and upon one of these occasions the trespass was justifiable, and on the other not, and the plaintiff is suing on account of the latter, but the declaration does not distinguish which he sues for; now, in such a case, if the defendant applying his plea to the first occasion admits it, and pleads the justification, the plaintiff should *newly assign*, stating that he sues not for the trespass admitted, but for another. Or, again, suppose the declaration is for several trespasses, without stating a particular number, and the defendant pleads a justification of several in particular, passing by one or more trespasses which the plaintiff intended to include, the plaintiff should, in this case, also *newly assign*.

The rule is thus laid down in 1 Williams' Saunders, 299 a, n. 6, that where the defendant has committed The rule in 1 Wms. Saund. 299 a.

been effected in pleading by the Common Law Procedure Act, 1852. See 1 Chit. Plead. 542; *Greene v. Jones*, 1 Wms. Saund. 209; Com. Dig. Plead. 3 M. 34; and for fuller practical information, see Part 2, "New Assignment."

^t Such ambiguity, assuming the declaration to be open to no ob-

jection, can only be a latent ambiguity, arising from the fact of there being two or more occasions equally answering the charge in the declaration. If there were an ambiguity patent on the face of the declaration, it would be bad, and only remediable by amendment.

The Rule.

several trespasses, either upon the person, goods or land of another, some of which are justifiable, and others not, and the action is brought for those trespasses which are *not* justifiable, but the defendant by his plea answers those only which *are*, the plaintiff by the replication should make a *new assignment*. Thus, if a defendant justifies an assault by virtue of a writ, which was not sued out until after the making of the warrant and the arrest; here, as the assault committed after the issuing and delivery of the writ was justifiable, but that which was committed before was not, and as the plaintiff was suing for the assault committed before the writ, but the defendant answered only that which was committed after, the plaintiff should *newly assign*. For the same reason, where the plaintiff was properly arrested at first, but detained *after* he had been duly discharged by the plaintiff in the original suit, if in an action for the false imprisonment, the defendant justifies under the writ, the plaintiff should newly assign.

Two classes of cases give rise to it.

There are two wholly different classes of cases which give rise to the necessity for a new assignment. First, where there are two or more *wholly distinct* occasions, upon which there have been *primâ facie* wrongful acts. Secondly, where the defendant pursues certain conduct *primâ facie* wrongful, but which in the particular case would have been justified, but he carries the act to *excess*, and the plaintiff brings an action on account of the excess.

Considerable difficulty is occasionally experienced in the application of the principle requiring a new assignment and in arriving at the proper construction of the pleadings, in order to ascertain whether or not a new assignment is necessary.

Object of the new assignment.

In the first place, the object of the new assignment is to bring the defendant's attention to the true cause of complaint, when his plea, although it answers a cause of action consistent with the charge in the declaration, has,

in the manner before explained, missed either wholly or in part the true cause of complaint. Now in all these cases the confusion arises in consequence of the generality of the declaration. When in certain of such cases there is a plea in confession and avoidance in language as general as the declaration itself, and the plaintiff has denied the justification and has not newly assigned, and then at the trial it is discovered for the first time that the parties are at cross purposes, each having in his mind a different occasion to the other—in such cases, the question arises, who, upon the proper construction of such pleadings, is to suffer for the ambiguity, in other words, what are the real propositions in issue.

Application of
the principle.

The answer to the above question will, it is conceived, be different in different cases, and will depend upon the form in which the declaration and the pleas present themselves.

A declaration general, in the above sense, may present itself in three different forms. First, it may be singular, for instance, it may charge but a single trespass. Secondly, it may charge a *definite* number of trespasses, as where there are several counts, each alleging a single trespass. Thirdly, it may be both plural and *indefinite*; for example, where it charges trespasses upon divers days and occasions.

The pleas in confession and avoidance of the declaration in such cases may also, for the purposes of the present question, be divided into two classes. First, such as particularize the cause of complaint which they confess, and *identify* it more or less from the rest. Secondly, such as simply confess and avoid the declaration in the same general terms as the declaration itself.

Declarations of the second class above mentioned may be at once disposed of, as being, so far as the present question is concerned, on the same footing as the first, each count being regarded as a single declaration.

Application of
the Principle.

The consideration of the question, therefore, will be limited to the other two classes, and to the position in which they stand when pleaded to in each of the two ways above mentioned.

Where plea is
explicit.

Now, with regard to the first class of pleas, there is no doubt whatever about the rule, in case such a plea is pleaded, whether to the definite or indefinite declaration. In such case, if the plaintiff should not newly assign, he will be concluded by the description given of the cause of action in the plea, and cannot go into evidence nor call upon the defendant to justify any trespass differing in its circumstances in any particular from the trespass as described in his plea.

Where plea is
general.

When the plea is general in its language, the rule is not so clear. It is suggested, that when the declaration is singular, a general plea in confession and avoidance amounts only to a singular proposition to this effect, *that the declaration is true, that there was an assault, but that it was justifiable*, and should the plaintiff traverse this justification instead of newly assigning, his proposition will amount to a universal negative; and the defendant, upon justifying any assault that fits the declaration, will make good his proposition, and the issue will be with him. This construction carries out the general principle of the new assignment, and is supported by justice and common sense,^u for in such a case the defendant has no means of knowing from the declaration itself which of two or more cases the plaintiff is suing for, and although, if it occurred to him that there were several, he might remove the difficulty by applying for particulars, yet it is quite possible that only one might occur to him, which he might admit and justify, whereas, had he known that the plaintiff was suing in respect of some other occasion, he might have denied it altogether. If, however, in such a case the plaintiff

^u There is also an old authority Salk. 453 ; 6 Mod. 117 ; 1 Wms.
for this view, *Helwis v. Lombe*, 2 Saund. 299 b.

newly assigns, that he sues not for the assault justified, but for another, the difficulty is thrown back upon the defendant, and if he denies the new assignment his proposition is universal and to the effect that he never committed an unjustifiable trespass, and upon this issue, if the plaintiff can prove a single trespass, which the defendant cannot justify, he makes good his proposition, and the issue is with him.

Application of
the Principle.

Lastly, where the declaration is indefinite and the plea general, there can never be any occasion for a new assignment; the plea amounts to a universal affirmative proposition, namely, admitting an indefinite number of trespasses, it asserts that they were all justifiable, and should the plaintiff traverse the justification, he will succeed upon showing any trespass or trespasses which the defendant cannot justify.*

When the defendant pleads in denial of the declaration, it is obvious that even when the declaration is ambiguous in the manner before explained, there can be no occasion for a new assignment. For example, if the declaration charges the defendant with a trespass, and he traverses the act of trespass, his plea amounts to a universal negative, and if the plaintiff proves any trespass consistent with the declaration, the plea is contradicted, and the defendant cannot then admit the fact and offer to show a justification; this would be considered a departure from his pleading, which, if allowed, would of course destroy the very object of the pleadings.

No new assignment necessary upon a traverse.

When the declaration charges several acts, the plaintiff may, with leave, reply and newly assign together, to the same plea, stating in the new assignment that he sues *not only* for the act in the plea admitted, but *also* for another or others. This is inadmissible where the declaration charges only a single act, as it would be inconsistent with, and consequently a departure from, such a

Replying and newly assigning.

* See *Barnes v. Hunt*, 11 East, 451.

declaration, to say that the plaintiff sues *not only* for the act admitted, *but also for another.*^y

One new assignment only is allowed to any number of pleas to the same cause of action.

Form of new assignment.

The new assignment is entitled and dated in every respect like an ordinary pleading; the following will serve as an example of it:—

The plaintiff says as to the second and third pleas, that he sues not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions, and for other purposes, than those referred to in the said pleas.

Where the plaintiff replies and newly assigns together, the new assignment will be as follows:—

And the plaintiff as to the second and third pleas further says, that he sues not only for the trespasses in those pleas admitted, but also for trespasses committed, &c.

Or thus, as the case may be:—

And the plaintiff as to the second and third pleas further says, that he sues not for the trespass in the said second plea admitted, but for the trespass in the said third plea admitted, and also for trespasses, &c.

It is submitted, that by the new assignment the plaintiff does not admit the truth of the justification,^z and

^y Cases have, however, passed before the writer in which leave has been granted to reply and newly assign, even when the declaration was singular. Such a replication, however, would be bad, notwithstanding the leave.

^z A contrary proposition is certainly to be found in the judgment in *Atkinson v. Matteson*, 2

Term Rep. 177, though such an universal proposition was not necessary to be decided for the purposes of that case. The proposition is also repeated upon this authority in 1 Wms. Saunders, *Jones v. Greene*, 299a, n. 6, and from here found its way into 1 Chit. Plead. 544.

that according to the true principle of construing the pleadings it amounts merely to this, that the plaintiff says to the defendant, "*You are under a mistake. I am not suing for what you suppose, but for something else; I do not say that you were or were not justified upon the occasion you are referring to, but that I am not suing for that.*"

After the new assignment the defendant pleads again; he has, however, only four days to do so, nor can he, without leave, plead over again any defence that he has already pleaded to the declaration, except a plea in denial.

Pleas to the new assignment.

CHAPTER XI.

THE ISSUES, AND THE TRIBUNALS BY WHICH THEY ARE
DECIDED.

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Preparing the
evidence.

THE pleadings being reduced to issue, their object is accomplished. The next proceeding is the drawing up and delivering the issues to the opposite party, preparatory to having them decided. It is also at this period, the propositions in dispute being now positively ascertained, that the parties prepare in detail the actual evidence by which they intend to support their respective cases. In advising upon the evidence, the pleader has frequently a much more difficult and important task to perform than in preparing the pleadings; indeed, the mere drafting the pleadings is generally simple and easy if the pleader is master of the law bearing upon the

particular case, whereas the advising properly upon the evidence often requires not only a great knowledge of law, but also a knowledge of the world in general, as well as the exercise of great discretion and judgment; and it not unfrequently happens that the knowledge of various arts and sciences gives important assistance to the lawyer in appreciating the gist of the propositions in issue; in seeing the proper points to be made; and, lastly, in making a discreet choice out of such evidence as the party has at command.^a The various modes of procuring evidence, as by the *notice to admit*, *notice to produce*, the *subpœna*, the *subpœna duces tecum*, by written *interrogatories* delivered to the parties to the action,^b by rule or order for *discovery*^c or for *inspection*,^d by *interrogatories* under the 1 Will. IV. c. 22, for the examination of witnesses unable to be present at the trial, and by *commissions* under the same statute for examining witnesses out of the jurisdiction, will be all found fully treated of in *Lush's Practice*, by Stephen, under the different titles.

Advising on evidence.

The plaintiff, then, in the next place, draws up the issues on paper, and delivers them to the other side for approval. In the case of an issue in fact, this proceeding is called *making up the issue*, and in the case of an issue in law, making up the *demurrer book*. If the plaintiff draws them up incorrectly, the defendant may return them, calling his attention to the mistake, or he may apply to a judge at chambers to order an amendment.

Making up the issue and demurrer book.

The issue consists of a transcript of all the pleadings from beginning to end, including demurrers as well, entitled in the Court and cause, and dated the date of the declaration, and containing a recital of the writ, and concluding with the award of the mode of trial.

The issue.

^a The student is referred to Taylor on Evidence, a book which should be studied carefully.

^b See p. 107, above.

^c See p. 105, above.

^d See p. 105, above.

The Issue.

The following is an example of the form of *the issue*, when there are issues in law and fact:—

In the Queen's Bench.

*The fourteenth day of June, in the
year of our Lord, 1856.*

Surrey.—A. B. by F. M. his attorney, sues C. D., who has been summoned to answer the said A. B. by virtue of a writ issued on the twelfth day of April, in the year of our Lord, 1856, out of her Majesty's Court of Queen's Bench for [copy declaration from these words to the end, and all the pleadings with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, but without the title or the marginal note of the cause, and conclude thus:] and because it is convenient and necessary that there be but one taxation of damages in this suit, therefore as well to try the said issues above joined between the said parties to be tried by a jury, as to inquire what damages the plaintiff hath sustained by occasion of the premises to be determined by the Court, in case judgment shall happen to be thereupon for the plaintiff, let a jury come, and let the same be tried accordingly.

Demurrer book.

The *demurrer book* is made up in the same way as the issue, with this exception, that those pleadings or portions of pleadings only that lead down to the issue in law are drawn up, the rest are left out.

Issues without pleadings.

It has been before stated that issues, both in law and fact, may be raised in other ways than by the pleadings.

In ejectment.

In the first place, there is the issue in ejectment; in this action there are never any pleadings;^e but the issue is made up at once by the claimants, setting forth the writ, and stating the fact of the appearance and the notice limiting the defence, if any, so that it may appear for what defence is made.^f

^e Common Law Procedure Act, 1852, s. 178; *Neave v. Avery*, 16 C. B. 328.

^f And the particulars, if any, must be annexed to the record when made up.

The following will serve as an example of the form of the issue in ejectment:—

Issue in
Ejectment.

In the Queen's Bench.

The twelfth day of June, A. D. 1856.

Middlesex.—On the day and year above written, a writ of our Lady the Queen issued forth of this Court, in these words [copy writ], and E. F. and C. D. have, on the seventeenth day of June, appeared by J. E. P. their attorney, and defended for the whole of the land therein mentioned. Therefore let a jury come, &c.

Secondly, the parties to an action may, at any time, after the writ issued and before judgment, by mutual consent and a judge's order, draw up an issue or issues in fact^g without pleadings, to be tried in the ordinary way, or a special case^h with questions of law for the opinion of the Court. The following will serve as an example of an issue by consent without pleadings:—

Issue and special case by consent.

In the Queen's Bench.

The fourteenth day of June, A. D. 1856.

London.—Whereas A. B. has sued C. D., for that the plaintiff being possessed of a mill, used a certain stream for the working the same, and the defendant diverted the said stream by cutting the bank thereof, and the plaintiff affirms, and the defendant denies, that the plaintiff was entitled, as of right, by reason of his possessing the said mill, to the full use of the flow of the said stream for the working of the said mill; and it has been ordered by the Honorable Baron Bramwell, according to the Common Law Procedure Act, 1852, that the said question shall be tried by a jury; therefore let the same be tried accordingly.

Issue by consent.

^g Common Law Procedure Act, 1852, s. 42.

c. 25; but now by the Common Law Procedure Act, 1852, s. 46, it may be stated at any time after writ issued.

^h The statement of a special case after issue joined had been authorized by the 3 & 4 Will. IV.

The following will serve as an example of a special case by consent without pleadings :—

Special case by consent. *In the Queen's Bench.*

Between
F. P. Plaintiff,
and
The London and South-Eastern
Railway Company . . } Defendants.

This is an action brought by the plaintiff against the defendants, to recover from the defendants the sum of £20: 7s., as damages for injury to a bale of silk, under the circumstances hereinafter stated. And by consent of the parties, and by the order of the Honorable Mr. Justice Coleridge, dated the tenth day of August, A. D. 1856, according to the Common Law Procedure Act, 1852, the following case is stated for the opinion of the Court without any pleadings :—

The defendants are common carriers by water for hire, from Boulogne to Folkestone, and common carriers by land for hire, from Folkestone to London.

The plaintiff is a silk merchant, and on the tenth day of September, 1855, he caused to be delivered to the defendants, as such carriers as aforesaid, at Boulogne, eight bales of raw silk, to be carried by them for hire to Folkestone, and thence to London.

Upon the delivery of the said bales to the defendants at Boulogne, they were declared to be raw silk, but their value was not declared. Each bale exceeded £10 in value. The defendants have a regular and published charge for the conveyance of raw silk from Boulogne to London, namely, 35s. per ton, and the plaintiff paid for the conveyance of the said bales at that rate.

During the transit by sea, one of the said bales fell into the sea and was damaged. For the purposes of this case it is admitted, that, subject to the questions hereinafter stated, the defendants are liable for the damage so

sustained, and that the amount of the damage is the sum above claimed.

The question for the opinion of the Court is, whether the defendants are liable to this claim, no declaration of the value of the said bale having been made by the sender upon the delivery to the carriers.

If the Court shall be of opinion in the affirmative, judgment is to be entered up for the plaintiff for £20:7s. and costs of suit.

If the Court shall be of opinion in the negative, judgment of non pros. is to be entered up for the defendants.

Thirdly, feigned issues form a large class of issues made up without pleadings. A feigned issue is one directed either by a Court of Law or Equity to be made up between the parties to any proceeding, in order to ascertain the truth of some matter of fact which is disputed, and which the Court thinks it desirable to have tried in the ordinary way. One of the most frequent examples is the feigned issue which the Courts of Law or any judge thereof have power to direct under the Interpleader Acts, in the cases to which those acts refer.¹

Also, in the case of a compulsory reference to arbitration, under sect. 3 of the Common Law Procedure Act, 1854, of a cause involving principally matters of mere account, it is provided by sect. 4 of the same act, that if it should appear to the Court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law, fit to be decided by the Court, or upon a question of fact, fit to be decided by a jury or by a judge upon consent of both parties as thereinbefore provided, it shall be lawful for such Court or judge to direct a case to be stated or an issue or issues to be tried, and the decision of the Court upon such case, and the finding of the jury or

¹ See "Interpleader," p. 30.

Feigned Issue. judge upon such issue or issues, should be taken and acted upon by the arbitrator.

The arbitrator may also, either upon a compulsory arbitration or upon an arbitration by consent, when the submission has been made a rule of Court, state the whole or a part of his award as a special case for the opinion of the Court.

When a feigned issue is ordered, the party who is directed to be plaintiff issues a certain form of writ applicable to this case, setting forth the issue and being in form as follows :—

In the Common Pleas.

The first day of May, A.D. 1856.

Warwickshire, to wit. — Whereas A. B. affirms and C. D. denies, that [state the matter in dispute], and the Lord Chancellor is desirous of ascertaining the truth by a verdict of a jury, and both parties pray that the same may be inquired of by the country. Now let a jury come, &c.

Argument of
the demurrer
or special case.

The cause having come to issue and this having been drawn up and settled by the parties, the next proceeding is the *trial* of the issues in fact, or the *argument* of the demurrer or special case.

All issues in law, whether raised by demurrer or special case, are argued before and decided by the Court itself sitting *in banco*. Certain days are appointed for the argument of these cases, and they are set down by either party in a paper kept at the Court for that purpose, which must be done four clear days before the case is to be argued, a four days' notice must also be given to the other side,^j and copies of the demurrer books or special cases must, at the same time, be delivered by the parties to the judges, each party contributing two copies; they must also furnish the judges, either upon the demurrer book or separately, with a statement of the

^j Reg. Hilary Term, 1853, r. 15, *infra*.

points intended to be raised in the argument.^k Upon the appointed day the points are argued by the counsel on either side, after which, in very clear cases, the Court delivers its judgment *ex tempore*, at other times, by an adjournment of *curia advisari vult*, it reserves the delivery of judgment until a future day.

Argument of
Demurrer.

If the party whose pleading is demurred to is of opinion that he is wrong, he should at this time and before the Court delivers judgment, apply to be allowed to amend, which he will be allowed to do before judgment, but not in general afterwards.¹ Where the issue in law is the only one raised in the cause, the judgment, thereupon, will necessarily be decisive of the whole controversy; where, however, issues in fact have also been raised, it may be necessary to have these also decided, before there can be a judgment upon the whole cause.

Issues in law, as it has been already stated, are invariably decided by the Court itself; with regard, however, to issues in fact, there are several modes of trial, the mode adopted in each particular case depending partly upon the nature of the issue, and partly upon other circumstances.

The trial.

At the present day there are four distinct modes of trial, namely, trial by the Court *in banco*, trial by a judge, trial by an arbitrator, and trial by jury.

Four modes of
trial.

Trial by the Court is a very unusual mode of trial, applicable only to one or two kinds of issues, some of which must be tried in this way, whilst with others it is optional. Where upon a pleading of some matter of record, the issue of *nul tiel record* is raised by a denial of the record, such issue is to be tried by the Court.

By the Court
in banco.

This mode of trial is commenced by a motion by either party to the Court for judgment, whereupon, in case the record pleaded is one of the same Court, it is produced by the officer of the Court and examined and

^k Reg. Hilary Term, 1853, r. 16,
infra.

¹ See *Bramah v. Roberts*, 1 Bing.
N. C. 483.

Trial by the
Court.

the issue decided ; if it is a record of another Court, the party pleading it must cause it to be produced in Court in order to be examined.

When the record has been pleaded by the defendant, he must be served with a four days' notice to produce it, and when the plaintiff has to produce it, he must in the Queen's Bench and Exchequer give the defendant a forty-eight hours' notice of his intention to produce it.^m

If the record is one of the Court in which the action is brought, the party obtains its production by merely giving a notice to the officers of the Court to produce it on the day appointed for the trial ; if it is a record of another and inferior Court, a writ of *certiorari* must be sued out from the Court in which the action is brought, or out of the Chancery, requiring the record to be certified to the Court ; where, however, it is a record of a Court of equal or superior jurisdiction, as a *certiorari* cannot issue from one Court to another of equal or superior jurisdiction, a *certiorari* must be sued out of Chancery, requiring the record to be certified to the Queen herself, upon the return of which writ to Chancery, with the certificate or transcript of the record, the latter is forwarded, by a writ of *mittimus* under the great seal, to the Court in which the record is required.

There are also other issues that may be tried in this way, such as those in which some official *certificate* is the proper and conclusive evidence of any fact, for instance, the marriage of the widow in an action of dower ; and lastly, a few rare cases, in which the statement of *witnesses* is conclusive upon the issue, as, for instance, where the death of the husband in dower is disputed.

Trial by a
judge without
a jury.

The trial by a judge without a jury is applicable to every species of issues, but takes place only in cases where the parties consent and obtain a judge's order to have the issue so tried. This trial takes place at *nisi*

^m *Hopkins v. Francis*, 2 D. & L. 664.

prius, and the proceedings connected with it are in every respect similar to those upon the trial by jury, to be presently described, so far as the latter are applicable; it being borne in mind that the judge performs the functions of both Court and jury. There are, however, these points of difference, namely, first, that in this case no new trial will be allowed, upon the ground of the verdict being against the weight of evidence; and secondly, that the counsel have no right to address the judge a second time at the close of their case, for the purpose of summing up their evidence.

The trial by an arbitrator may be had in all actions in which the parties consent and obtain a judge's order to have the issues decided in this way, and this is constantly done even after a trial has been commenced before a jury, when it appears that the issues might be more satisfactorily dealt with in this way.

Trial by an arbitrator.
By consent.

In the next place, if in any action after writ issued it is made to appear to the Court or a judge, that the matters in dispute consist wholly or in part of matters of mere account,ⁿ such Court or judge may, upon the application of either party, order the matter to be referred, either to an arbitrator chosen by the parties, or to the master of the Court, or in country causes to a County Court judge.^o This mode of trial is governed by the same principles as the trial by a judge; it is, however, less formal, and the powers of the arbitrator depend entirely upon the terms of the order of reference.^p

Compulsorily.

The trial by jury is by far the most important of all. Its general relation to the other proceedings in the action

Trial by jury,

ⁿ A cause may be compulsorily referred though it involves matters in dispute. *Browne v. Emerson*, 2 Jur. (N. S.) 190; see also, below, p. 154, "Compulsory reference of Actions for Sums under 50*l.* to the County Court."

individual question of fact or law may be separated and decided in the usual way. See "Issue on Compulsory Reference," p. 149.

^p See Common Law Procedure Act, 1854, ss. 3—17, and Russell on Arbitration.

^o Even when this is done, any

At nisi prius,

At bar.

Before sheriff
or a judge of
inferior Court.

3 & 4 Will. IV.
c. 42, s. 17.

has been already described. This mode of trial may take place as formerly described, either at *nisi prius* or *at bar*.^q It may also, in certain cases, be had before the sheriff, or before a judge of any inferior Court of Record, or in the County Court.

Thus, by the 3 & 4 Will. IV. c. 42, s. 17, it is enacted, that in any action depending in any of the Superior Courts for any *debt* or *demand*, in which the sum indorsed on the writ of summons does not exceed 20*l.*, it shall be lawful for the Court in which such suit shall be depending, or any judge of the said Courts, if he or they shall be satisfied that the trial will not involve any difficult question of fact or law, to order the issues to be tried before the sheriff of the county, or any judge of any Court of Record for the recovery of debt in such county.

Writ of trial.

In this case a *writ of trial* is issued to such sheriff or judge, commanding him to summon a jury and to return the writ of trial, with the finding of the jury indorsed thereon.

In the County
Court, 19 & 20
Vict. c. 108,
s. 26.

It had been decided that this provision did not apply to the new County Court.^r This decision has, however, been superseded by the 19 & 20 Vict. c. 108 (County Court Act), s. 26, whereby it is enacted, that where, in any *action of contract* brought in a Superior Court, the *claim indorsed on the writ does not exceed 50*l.**, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into Court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of a Superior Court, on the application of either party, *after issue joined*, may order the cause to be tried in any County Court, and thereupon the plaintiff shall lodge with the registrar of such Court such order and the issue, and the judge of such Court shall appoint a day for the hearing, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attor-

^q See p. 20.

^r *Owens v. Breece*, 6 Exch. 916, also 413.

nies, and after the hearing, the registrar shall certify the result to the master's office of such Superior Court, and judgment, in accordance with such certificate, may be signed in such Superior Court.

The trial by jury is applicable to every species of issue whatsoever, except the *nul tiel record*, and it may be resorted to as a matter of course in all cases, unless the opposite party takes the proper steps to obtain one of the other modes of trial, as the award of the mode of trial is not formally granted by the Court, as in ancient times, but stated, as a matter of course, at the end of the issue, by the party drawing it up.

CHAPTER XII.

PROCEEDINGS UPON TRIAL BY JURY.

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THIS mode of trial having been determined upon, the plaintiff must give to the defendant ten^a days' *notice of trial*, that is to say, of the sittings or assizes at which

^a Unless the defendant is under terms to take *short notice* of trial, which is four days.

he intends to bring the cause on for trial, which must be in the county as laid in the venue in the declaration. This notice is usually given with the issue delivered to the defendant. The notice may again, at any time, not less than four^b days from the time of trial, be countermanded.^c

Notice of Trial.

The next proceeding is to draw up the issue upon convenient sheets of parchment, to constitute the record of *nisi prius*; to this record the plaintiff must also annex a copy of all particulars delivered with the pleadings, and also a list of the jurymen summoned by the sheriff, which list he may procure from the under-sheriff.

The record must then be entered with the officer of the *Nisi Prius* Court, a short time before the time appointed for the trials.^d The officer then enters the cause on the list for trial. If the plaintiff neglects to enter it in proper time, the defendant may enter a *ne recipiatur* with the officer. Should the plaintiff, after issue joined, neglect beyond the time required by the rules^e to give notice and to proceed to trial, the defendant may give him a twenty days' notice to proceed, and, if, after that, the plaintiff does not give notice of trial and proceed in pursuance thereof, the defendant may enter a suggestion upon the record of such default, and will then be entitled to his costs; the suggestion in this, and in all cases where the record has not yet been made up and taken in, is entered in the following way: the defendant applies to the Court by motion for a rule calling upon the plaintiff to show cause why the record should not be drawn up and entered with the officer, and upon this being done, the suggestion may be entered with or without leave, as the case may be, and, in like manner, may be pleaded to, demurred to, or struck out

Nisi prius record.

Twenty days notice to proceed.

Entry of suggestion on roll.

^b Or two days where there has been short notice of trial.

^c Or, in London and Middlesex, it may be *continued* to the next sittings.

^d See Reg. Hilary Term, 1853, r. 43 and 45, *infra*.

^e Common Law Procedure Act, 1852, s. 101; Reg. Hilary Term, 1853, r. 58, *infra*.

Taking cause
to trial by
proviso.

again, according to circumstances; in the present case, however, the suggestion cannot be pleaded to, it is only liable to be struck out, if untrue. Should the defendant prefer it, he may make up the record, give the plaintiff notice of trial, and take the cause down to trial himself, which mode of proceeding is called bringing the cause to trial by *proviso*, which term originated in the circumstance, that in the old writ of *venire facias* issued to the sheriff in such case, commanding him to bring the jury, there was a *proviso*, that if a similar writ should also come to him from the plaintiff, he should execute only one of them.

Commence-
ment of the
trial.

The ancient writ of *venire facias juratores*, which was formerly issued in every cause to the sheriff, is now abolished, and instead, the sheriff summons a sufficient number of common jurymen and special jurymen, in obedience to a precept issued by the judge of *Nisi Prius*,^f for the trial of all issues that may come on for trial.

On the appointed day, the jury and the judge and the officers of the Court attend, and after the formal opening of the Court, the first cause on the list is called, and if either of the parties declare themselves ready, the proper officer of the Court proceeds to call and to swear twelve jurymen to try the issues joined between the parties in that cause. During this proceeding either party may object to or challenge any of the jurymen, the presiding judge deciding upon the validity of the objection if disputed.^g

Withdrawal of
the record.

At any time before the jury are sworn, the plaintiff may withdraw the record, which he will do if for any reason he wishes to postpone the trial, and he will even be allowed to delay the swearing the jury whilst a material witness is called upon his *subpœna*. In general, however, if he withdraws the record, he will be obliged

^f See Common Law Procedure Act, 1852, ss. 104 — 116; and Reg. Hilary Term, 1853, rr. 44—

49, *infra*.

^g See Lush's Practice, "Challenge of Jury."

to pay to the defendant his costs of the day, nor will he be entitled, even if he succeeds upon the trial afterwards, to the additional costs occasioned by bringing the cause on a second time for trial. The judge will also, for any fair reason, upon the application of either party, if not opposed, postpone the cause to others on their list, or he may adjourn the trial to another sittings. In all cases where a cause is adjourned from one sittings or assizes to another, it is said to have been made a *Remanet*, and this is generally done when there is not time to get through the list.

Adjournment
of trial.

Remanet.

The jury being sworn, the junior counsel for the plaintiff opens the pleadings, that is to say, he states to the Court and jury the substance of the pleadings, and the issues which the jury will have to try. After this the leading counsel for the party who begins, whom we will assume to be the plaintiff, addresses the Court and jury, and relates and explains in detail the facts which he proposes to give in evidence, in support of his side of the issues, and offers such suggestions as he may think desirable, in order to point out how such facts entitle the plaintiff to the claim which he seeks to enforce in that action.

Opening of the
pleadings.

Stating the
case.

In the next place, the evidence in support of the propositions to be maintained by the plaintiff, is laid before the Court. In the case of oral testimony, each witness is first *examined in chief* by one of the counsel for the plaintiff, and then *cross-examined* by the leading counsel for the defendant, whose object will be either to shake his testimony, by exposing his inaccuracy or want of veracity, or to elicit from him facts that are favourable to the defendant's side of the issue; upon the closing of the cross-examination, the leading counsel for the plaintiff, if necessary, *re-examines* the witness for the purpose of giving him an opportunity of explaining and setting right any facts that were only partially drawn out by the defendant's counsel.

Examination,
cross-exami-
nation, and re-
examination of
witnesses.

Examination of Witnesses.

At any time during the examination of the witness the judge also puts any questions he may think proper, and so, also, may the jury, with the permission of the judge. Either party, also, may, with the permission of the judge, recal a witness, after he has closed his case, in order to supply some omission.

The defence.

The evidence for the plaintiff having been completed, it becomes the duty of the defendant's counsel, in his turn, to open the case for the defence; before he does so, however, the counsel for the plaintiff, or in fact the counsel for whichever party begins at the trial, is allowed, at the close of his case, in the event of his opponent not then announcing his intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and pointing out to them in what manner he conceives it has supported his side of the issues. The counsel for the defence, in the next place, lays before the Court and jury the defendant's case, and proceeds, when this is necessary or desirable, to offer evidence to rebut the case made by the plaintiff, at the close of which he also has a right to address the jury a second time, for the purpose of summing up the evidence; it may be, however, that the production of independent evidence on his part is either impossible or undesirable, in which case he must rely upon being able to persuade the jury that as the case stands upon all the facts brought out upon the plaintiff's evidence, the account of the matter suggested to them on behalf of the defendant is the most natural and probable view of the case, and for this purpose he may attempt to throw discredit upon the plaintiff's witnesses, or suggest inferences from the facts proved, different to those drawn by the other side.

The reply.

The party who begins has always a right of final reply upon the whole case, whenever his opponent offers any evidence whatever.

Function of the judge.

The whole of these proceedings are, during their

progress, controlled by the presiding judge, his decision upon every subject being, for the period of the trial, conclusive. He takes down, at the time of its production, a note of all material evidence, at the same time restraining either party from going into evidence that is irrelevant or otherwise improper to be received. It is his function to decide all disputed points of law arising in the course of the trial, whether as to the admissibility of evidence or otherwise; and, lastly, to review or sum up all the material evidence for the benefit of the jury, calling their particular attention to the most important portions thereof, explaining precisely the propositions they will have to decide, and directing them as to the legal effect to be given, in considering their verdict, to this or that fact, if they should be of opinion that it has been satisfactorily proved, it being the proper function of the jury to determine all disputed matters of fact, and of the judge to decide all points of law.

To take for illustration the following case: to an action for negligently and furiously driving against the plaintiff's carriage, whereby the plaintiff was thrown out and injured, the defendant pleaded not guilty: upon the trial of this issue, there was evidence that the defendant was driving furiously and carelessly, and that his carriage overtook and came in collision with that of the plaintiff; that the plaintiff's carriage, in consequence of the collision, was thrown out of the road, and was carried over the fence, and fell over a steep embankment. There was also evidence that the plaintiff was driving at a furious rate, and that the actual falling over the embankment was occasioned as much by the momentum of the plaintiff's carriage, caused by the improper speed at which he was driving, as by the accident. It was urged on behalf of the defendant, that the injury sustained by the plaintiff had been brought on by his own negligence, quite as much as by the defendant's, and that if he had been driving as he ought

Judge's direction to the jury.

Direction to
Jury.

to have been, he would not have been hurt, and that, therefore, it was an accident, for the consequences of which neither was liable to the other.

The judge directed the jury, that in considering their verdict upon the issue of not guilty, they would have to consider the following propositions: first, had the defendant been guilty of negligent and improper driving, and would this alone have occasioned the accident? if so, it would be clear that the verdict must be for the plaintiff: secondly, did they think it was proved that the plaintiff also had been guilty of negligence? and then, if so, first, did his negligence contribute to the *occurrence* of the accident, that is to say, would no accident at all have happened, had he been driving as he ought to have been? if so, then the verdict must be for the defendant, both having contributed to the accident: secondly, if they thought the plaintiff's furious driving had nothing to do with the original collision, but that the accident was made much more serious by the fact, that the plaintiff's carriage was, at the time, going at an improper speed, then they should find a verdict for the plaintiff; but in assessing the damages, they should take into account how much of the injury he had brought upon himself.^e

Duty of jury.

In considering their verdict, the jury are to entertain no other question than the issue raised on the record; this, and this alone, they are sworn to try, and they are bound by their oaths to take no other questions into consideration.^f

Secondly, to give their verdict in favour of that party who has established his side of the issue upon the evidence brought forward at the trial, and, lastly, to take into account that evidence only, which is relevant to the

^e Upon this subject consult the cases of *Davies v. Mann*, 10 M. & W. 546; *Dowell v. General Steam Navigation Company*, 1 Jur. (N. S.)

800; *Rigby v. Hewitt*, 5 Exch. 240; *Thorogood v. Bryan*, and *Catlin v. Hills*, 8 Q. B. 115.

^f See further, p. 170, *infra*.

propositions they have to determine. If this were not so, one of the principal objects of the pleadings would be lost, for neither party would be safe in limiting his evidence to the issues raised thereby.

The jury having made up their minds upon the facts, deliver their *verdict*. In so doing, it is essential that they should be *unanimous*; if they cannot agree, they will ultimately be discharged from giving any verdict, but the parties may, by mutual consent, take the verdict of a less number than the whole.

The verdict.

The verdict is either *general* or *special*.

General or special.

The general verdict consists of a simple statement, that they find *a verdict for the plaintiff, damages* so much, or for the defendant, as the case may be.

When, however, they feel satisfied as to the facts, but are ignorant what legal effect is due to one or more of them, and are consequently doubtful which party is entitled in point of law to their verdict, they may deliver a *special verdict*, wherein all the facts as found by the jury are set forth, and referred to the Court for its opinion, the jury declaring, that they find for that party who, in the opinion of the Court, is entitled to their verdict upon that state of facts.

In ancient times, a plaintiff who failed to make good his complaint was heavily fined, and it became usual before the jury delivered their verdict to call the plaintiff, in order to see that he was in Court, so that he might be fined if the verdict was against him. If upon being called he did not answer, the defendant became entitled, without any verdict being taken, to a judgment of *nonsuit*, the plaintiff being considered to have deserted his suit, and, at the present day, it is usual for the plaintiff, when he finds that his case wholly breaks down, to suffer himself to be *nonsuited* in preference to taking a verdict, the advantage of so doing, being that, after he is nonsuited, he may commence a fresh action for the same cause, and may come provided against the defect,

Nonsuit.

whereas, if the defendant has judgment upon a verdict, the plaintiff is for ever barred from suing again for that cause of action. The mode of nonsuiting is still by *calling* the plaintiff three times in Court, and upon his not answering he is nonsuited.

The *postea*.

The trial terminates with the verdict, and after it is over a memorandum of the proceedings, called the *postea*,^f is entered upon the record, thereby completing the *record of nisi prius*, upon the whole of which, as it now stands, the judgment of the Court is founded, for it will be remembered that upon this record are entered not only the issues in fact, but also the demurrers.

The *postea* is formally drawn up and entered after the trial is over. In the case of a special verdict it is not made up at the time, but the facts are settled afterwards between the parties, and if they fail to agree upon the exact terms, the judge who tried the cause will, upon summons at chambers, settle them from his notes. The jury may, if they like, insist upon delivering a general verdict, but if they do so it is their duty to give such legal effect, as the judge has directed them, to the state of facts they believe to have been proved by the evidence.^g

As above stated, it is the function of the judge to decide all points of law arising at the trial, and also to direct the jury upon the law of the whole case, so far as is necessary for them to give proper effect to the evidence, and for the period of the trial the decision of the judge is final. Either party, however, being dissatisfied with the law laid down by the judge, either in deciding any disputed point of law arising in the course of the trial, or in his direction to the jury, has two courses open to him, by which he may dispute it in the Court in which the issue was joined, or in a higher Court.

Objecting to

In the first place, he may call the judge's attention to

^f With which word it commenced when the proceedings were entered in Latin.

^g See "Form of Postea," *infra*.

his objection, and afterwards, if the trial goes against him, move the Court for a *new trial*, on the ground of an improper admission or rejection of evidence, or as the case may be, or on the ground of *misdirection* to the jury.^h

ruling of judge
in order to
move for a
new trial.

Secondly, he may tender a *bill of exceptions*ⁱ to the judge's ruling. This consists of a statement of the proceedings in the cause, setting out the ruling objected to, with the objection made thereto, and to this, if correctly stated, the judge is bound to affix his seal.^j The cause then goes on to verdict and judgment, after which the bill of exceptions may be tacked to the record of the judgment, or, as it is called, the *judgment roll*, and the whole then taken before the Court of Error, where the judgment of the Court below will be reviewed in connexion with the points raised by the bill of exceptions, and either a new trial granted or the judgment below affirmed, or modified.^k

Tendering bill
of exceptions
in order to
bring error.

Although the bill of exceptions must be tendered before verdict, it is never formally drawn up at that time; in practice, a memorandum merely of the points of objection is written down on a slip of paper and handed to the judge, and after the trial is over, the bill is formally drawn up and settled by the opposite parties, and then signed and sealed by the judge.

The bill of exceptions may either be drawn up as a separate record, consisting of the issue as made up, together with a statement of so much of the proceedings as is necessary to make the whole intelligible, and then

^h See "New Trial," *infra*.

ⁱ Upon this subject, see *Enfield v. Hills*, 2 Lev. 236; *Money v. Leach*, 3 Burr. 1692.

^j If the judges refuse to do so, the party has a remedy given to him by the Statute of Westminster 2, c. 31, by virtue of which he is entitled to a writ directed

to the judges, which, reciting the bill of exceptions, proceeds, *quod si ita est, tunc sigilla vestra apponatis*; and if the judges return *quod non ita est*, the party may maintain an action against them for the false return. 2 Inst. 426; *Rowe v. Brenton*, 3 M. & R.

^k See "Error," *infra*.

Bill of
Exceptions.

the ruling objected to and the exception taken to it, the whole of which may then be tacked to the judgment roll; or it may be drawn up together with the verdict and judgment, in the order in which each proceeding took place, upon a single record, preparatory to taking the case before the Court of Error.

The following is the form¹ of the bill itself. [After the issue proceed thus]—

Afterwards, on the twenty-ninth day of July, A.D. 1856 [the commission day], at Guildford, in the county of Surrey, before Sir Cresswell Cresswell, Knight, and Sir James Shaw Willes, Knight, justices of our said lady the Queen, assigned to take the assizes in and for the within county, come the parties within mentioned, by their respective attornies within mentioned, and a jury of the said county being summoned also come, who being sworn to try the matters in question between the said parties, the said several issues in manner aforesaid came on to be tried, and thereupon to maintain the issue secondly above joined the defendant then and there gave in evidence to the jury aforesaid, that [as the case may be], and thereupon the plaintiff offered to prove that [as the case may be], whereupon the counsel on the part of defendant interposed and insisted that the said evidence so offered to be given by the plaintiff to the jurors aforesaid was not good or admissible in law upon the issue aforesaid, and prayed the said justices to inform the jurors aforesaid, that the said last-mentioned evidence was not good or admissible in law upon the issue aforesaid, and that the issue aforesaid secondly above joined ought to be found for the defendant. But the said jus-

¹ By a remarkable coincidence both the form of the bill of exceptions in Chitty's Forms and the one in Lush's Practice contain an error precisely the same to the very letter. These forms state the exception to have been taken after

verdict; this, of course, makes the whole bill bad, and, unless amended, the points raised thereby could not be taken notice of by the Court of Error. See *Cully v. Taylorson*, 11 A. & E. 1013.

tices held and affirmed that the said evidence so offered to be given by the plaintiff as aforesaid was good and admissible in law, and thereupon the plaintiff gave in evidence and proved to the jurors aforesaid, that [the evidence objected to], and the said justices by their direction to the said jury, according to their opinion, left the consideration thereof to the jurors aforesaid. Whereupon the counsel for the defendant conceiving that by law the matter aforesaid, so as aforesaid given in evidence to the said jurors by the plaintiff, on the issue aforesaid secondly above joined, was not admissible in law upon the said issue, made their exceptions to the said opinion of the said justices, and as the said matters aforesaid would not appear by the record of the verdict upon the said issue, the counsel on behalf of the defendant prayed that the said justices would set their hands and seals to their bill of exceptions, containing the several matters so proved and given in evidence as aforesaid, according to the statute in such case made and provided, and thereupon the said Sir Cresswell Cresswell, Knight, hath set his hand and seal thereto, according to the said statute, at Guildford aforesaid, the 27th day of July, A.D. 1856.

Bill of
Exceptions.

Cresswell Cresswell.

In all cases, also, at the close of the case of the party who begins, his opponent may withdraw the whole from the consideration both of the judge and the jury by *demurring* to the evidence. This proceeding is in the nature of a pleading at the trial, admitting all or any portion of the facts offered in evidence to be true, and contending, that they do not support the allegations to be proved; in this case, the trial is at an end, as there is nothing for the jury to decide, the facts being admitted,^m and their legal effect only disputed; the jury,

Demurrer to
evidence.

^m If there has been conflicting evidence, the demurrer must admit such of the facts as the opposite side considers to be the true

Demurrer to
Evidence.

however, may be required to assess contingent damages in case the judgment should be in favour of the plaintiff in the cause. This, however, is not necessary, as the plaintiff may, in this and other cases, procure the amount to be assessed afterwards by a jury upon a *writ of inquiry*.ⁿ

After the trial, the demurrer is entered on the record; it contains a statement of the facts admitted to have been proved, and then relates that it was objected that such facts did not support the allegations to be maintained, and, lastly, calls upon the Court to give judgment in the matter.^o The record is afterwards taken before the Court and the points argued, as in the case of an ordinary demurrer.

The demurrer to the evidence is, however, a very unusual mode of proceeding; it being more usual to bring the question before the Court in one of the several other modes of doing so.

It occasionally happens, however, that a proposition of law will arise which the judge may not feel disposed to decide, himself, or which neither party may wish him to decide, it being thought desirable by all that the opinion of the Court should be taken upon the point. There are several modes by which this may be done.

Verdict sub-
ject to a spe-
cial case.

In the first place, the jury may be requested to find all the facts in a *special verdict*, as before described, leaving the Court to decide upon their legal effect, or the parties may agree to take a *general verdict subject to a special case*, setting out the disputed point of law, and agreeing that the verdict shall turn upon such question of law; when this is done, the special case is drawn up separately and taken before the Court and argued like a demurrer, the entry of the verdict upon record being

ones; and if they cannot agree upon this, there can be no demurrer to the evidence, as the jury alone, who have observed the demeanour of the witnesses, are

the proper judges of which fact is proved and which not.

ⁿ See "Writ of Inquiry," *infra*.

^o See Form of Demurrer to Evidence in Chitty's Forms.

postponed until the decision of the Court upon the special case; if the parties have agreed that the decision of the Court shall be final, and that the case shall not be taken to a Court of Error, the general verdict is entered on the record without any reference to the special case; if, however, no such agreement has been come to, and it is intended to appeal against the decision of the Court, the whole of the proceedings, including the special case, the verdict and the judgment, must be regularly entered on the record.

Verdict subject
to Special
Case.

In substance the special case is drawn up in the same manner as the special case upon consent,^p the formal parts being adapted to the different circumstances in which it arises, as follows:—

In the Exchequer of Pleas.

Between { Edward Lamb, Plaintiff,
and
Charles Edwards, Defendant.

This was an action brought by the plaintiff to recover from the defendant the sum of £300, for money received by the defendants to the plaintiff's use, under the circumstances hereinafter stated; the defendant pleaded never indebted, and the cause came on for trial before the Honorable Mr. Justice Willes, at the Summer Assizes, A.D. 1856, in and for the county of Derby, when a verdict was found for the plaintiff for £300, subject to the opinion of the Court upon the following case:—[the case.]

It is agreed between the parties that the pleadings in this action shall form part of this special case.

The questions for the opinion of the Court are first, whether, [and so on as the case may be]. If the Court shall be of opinion [as the case may be], then the verdict is to be entered for the plaintiff as aforesaid, but if the Court shall be of a contrary opinion, then a verdict is to be entered for the defendant.

^p See "Example," p. 148.

Reservation of point with leave to move the Court.

In the next place the judge may, after a *nonsuit* or a verdict, if he think proper, reserve a point of law, and give the unsuccessful party *leave to move* the Court *upon the point reserved*, either to enter a verdict or a nonsuit, as the case may be.⁹

Rules of evidence affecting the pleadings.

There are several important rules relating to the evidence to be adduced on the trial, without knowing something of which it would be impossible fully to understand the principles of pleading.

Evidence to be confined to the points in issue.

In the first place, the evidence must be confined to such matters as are *relevant* to the propositions that the parties have put in issue on their pleadings. Thus, if to a declaration upon a breach of contract the defendant pleads in confession and avoidance, that after the breach the plaintiff gave him a release, and the plaintiff denies the release, and issue is thereupon joined; the only question raised by such pleadings is, whether a release has or has not in fact been given by the plaintiff to the defendant; therefore, according to the rule, it would not be admissible for the plaintiff on the trial to touch upon any evidence tending to show that the release, if there was one, had been obtained by means of fraud, nor for the defendant to introduce any evidence contradicting the original contract and his breach thereof, as stated in the declaration and confessed in the plea.

The jury can determine no other point than the issue on the record.

Nor could the jury, in such a case, determine any other question than whether or not a release had been given; for example, they could not find that there had been a release fraudulently obtained from the plaintiff by the defendant, nor could they find that the defendant had never entered into such a contract as that stated in the declaration. And they are bound, in determining the matter in issue, not to allow themselves to be influenced by any evidence improperly elicited, such as, in the

⁹ See motion to the Court to enter a *nonsuit* or a *verdict* pursuant to leave of the judge upon a *point reserved* at the trial.

above case, evidence casting either doubt upon the terms of the original agreement on the one hand, or imputing fraud to the defendant on the other.

Rules of Evidence affecting the Pleadings.

Such rules are indispensable in order to carry the object of the pleadings into effect. If either party, after passing by in his pleading a material point of his case, was allowed at the trial to suggest it or elicit it in evidence, and the jury were allowed to be influenced by it, all certainty as to the extent to which the parties should come prepared with evidence would be gone, and the object of the pleadings frustrated. There would be nothing to prevent a fraudulent plaintiff or defendant from drawing his pleadings in such a way as to mislead his opponent, and at the trial to take him by surprise, by setting up a case which, although without foundation, it might be impossible, unprepared, to refute.

In such a state of things, instead of each party knowing before the trial that he had certain definite propositions to maintain or refute, as the case might be, and being therefore in a position safely to come prepared to meet these propositions only, neither would be safe unless he came prepared to meet every issue that might chance to be raised.

It is, therefore, a rule that both parties shall raise by their pleadings the propositions upon which they mean to rely, and that upon this point the pleadings shall be conclusive.

In the next place, the burden of proving a proposition in issue falls upon the party maintaining the affirmative: the maxim being *Ei incumbit probatio qui dicit, non qui negat*.

The onus probandi lies upon the one alleging the affirmative.

Thus, in the example above given, it lies with the defendant to give evidence of a release before the plaintiff can be called upon to negative the fact; if, on the other hand, the plaintiff, instead of traversing the release, had replied in confession and avoidance, that it had been obtained from him by fraud, it would have

Onus probandi. been incumbent upon him to have first given evidence of fraud, whereupon, and not before, the defendant would have been called upon to clear himself.

This rule, however, is not always easy of application. The determination of the question, *which party maintains the affirmative?* does not depend upon the grammatical form of the proposition in issue, but upon its substance in point of fact, as the same proposition may, in general, by the mere choice of language, be stated in the *form* of a negative or an affirmative.¹ The real question is, which party sets up disputed facts that would not otherwise have been brought into notice? whichever party does this, maintains the affirmative within the meaning of the rule.

The rules given by Alderson, B.,² for determining in doubtful cases which of the parties may be said to maintain the affirmative, are, first, to consider who upon the face of the record would succeed in case no evidence were offered on either side; or, secondly, who would succeed if the allegation in issue were struck out of the record, and that party who in either case would fail is the one upon whom falls the burden of proof.

Exceptions.
Where there is
a presumption
of law.

To the general rule, however, there is this general exception, that where there is a presumption of law in favour of any state of things, the party seeking to contradict this must first rebut the presumption. For example, where one affirms and the other denies that a certain person is living, the one who denies the fact must give evidence of the death.

Where the
matter is pecu-
liarly within
the knowledge
of one party.

There is also another class of cases which form an exception to the general rule, as well as to the above exception, namely, where any matter is peculiarly within the power of one party to give evidence concerning it, he must give evidence in support of his allegation re-

¹ *Amos v. Hughes*, 1 M. & R. 464; *Geach v. Ingall*, 14 M. & W. 97.

² *Ridgway v. Ewbank*, 2 M. & Rob. 218; *Geach v. Ingall*, 14 M. & W. 97.

specting it first.³ Thus, in actions against persons for doing acts which they have no right to do without being duly qualified, the defendants must show their qualifications.⁴

Thirdly, it is a general rule that the party upon whom lies the *onus probandi* has the right to begin at the trial. The right to begin is in general an advantage, as the party beginning has the opportunity of making the first impression upon the jury, and if his opponent goes into evidence he has also the last word. It may, however, be a disadvantage, as where either party relies upon the weakness of his opponent's case, he may entirely fail if obliged to begin.⁵

The party upon whom lies the *onus probandi* has the right to begin.

There is one qualification to this rule, which also gives rise to an exception—it is this, the plaintiff is required to prove only, in the first instance, a *primâ facie* case, that is to say, such a case as will, if unanswered, support his cause of action, and when the defendant has rebutted the *primâ facie* case, the plaintiff will be allowed and will be required to disprove the defence. This will frequently happen where the matters in dispute are not explicitly raised on the record, and will most frequently occur in *ejectment*. Probably it frequently occurs also in the County Court. The exception which this gives rise to is the following; if in such a case the defendant will admit the whole *primâ facie*^v case of the plaintiff, then, provided he could not have done this by a plea in confession and avoidance, he will have the right to begin.

Exceptions.

Where defendant admits plaintiff's *primâ facie* case.

There is also a second and much more frequent exception to this rule as to the right to begin, namely, that whenever the plaintiff goes for *substantial*^x and

Where plaintiff seeks substantial and unliquidated damages.

³ *Elkin v. Janson*, 13 M. & W. 662.

⁴ *Apothecaries' Company v. Bentley, Ry. & M.* 159.

⁵ *Edwards v. Jones*, 7 C. & P. 633.

^v *Doe v. Brayne*, 5 C. B. 655.

^x *Chapman v. Rawson*, 8 Q. B. 673.

unascertained^y damages, he may begin and give evidence of the damage.

In case there are several issues, and the burden of proving one of them lies on the plaintiff, he has a right to begin, if he will undertake to give evidence upon it.^z

The party upon whom the onus probandi lies must make good his allegations.

The party upon whom the onus of proving any proposition lies, must make good his allegations by such evidence as will, if true, support them in point of law; if he fails to do so, his opponent will be entitled to consider his side of the issue established, without the necessity of offering any evidence at all; the maxim is, that the plaintiff must recover *secundum allegata et probata*, and the same applies to the defence, when the onus lies with the defendant.

Evidence defective in quantity.

The party upon whom the *onus probandi* lies may fail in his proof in either of two ways, first, his evidence may be defective in quantity; for example, in an action for a malicious prosecution, the defendant pleaded not guilty, the plaintiff proved the prosecution by the defendant, and that he was acquitted, and also that the defendant was actuated by revengeful and malicious feelings, but here the evidence stopped; it was, therefore, deficient in quantity, for granting all this to be true, *non constat* that the defendant had acted *without probable cause* for believing the plaintiff's guilt, which it is essential he should have done, in order to make him liable in this action.^a

Variance.

Secondly, the evidence, without falling short in quantity, and whilst even disclosing a good cause of action or defence, as the case may be, may disclose facts at variance with the allegations in the pleadings; this defect, which is called *a variance*, is, for the reasons presently mentioned, quite as fatal as a total breaking down of the evidence.

^y *Mercer v. Whall*, 5 Q. B. 447.

^a *Hounsfield v. Drury*, 10 A. & E.

^z *Rawlins v. Desborough*, 2 M. & R. 328; see Taylor on Evid. 334.

98, 433.

The principle of this maxim is really the same as that of the rule which requires the evidence to be confined to the propositions put in issue on the record, the object of it being to secure to both parties the knowledge to a certainty, from the pleadings, what propositions they will be required to maintain or contradict respectively, and further than is necessary to carry that object into effect, the rule is not rigidly adhered to.

Variance.

Thus, although the rule requires a party who makes his allegations more explicit than is necessary, to prove them as he states them, yet any distinct propositions that are wholly superfluous will be struck out of the record by the judge as *surplusage*.

Striking out
surplusage.

So, again, if the evidence should disclose a case varying from that stated in the pleadings, the judge has power^b at any time to amend the record in such manner as may be necessary to determine the *real question in controversy* between the parties, this being understood to mean the question which the parties intended to have tried, not any question which during the course of the trial may for the first time be brought into controversy; for example, where the declaration stated that the defendant, in consideration of the plaintiff's supplying A. with beer, promised to *pay* the plaintiff for the beer, and the evidence showed that the defendant had *guaranteed* the payment to the plaintiff, thus showing that there had been a *collateral*, though *no original* undertaking, as alleged in the declaration, in this case the judge amended the record, by substituting an allegation of a guarantee of payment, instead of that of the original promise.^c Also, where, in an action by indorsee against drawer of a bill, the declaration alleged due notice of dishonour, and the evidence showed that there had been in fact no notice of dishonour given, but the circumstances were such as to have superseded the necessity of giving

Amendment of
variance.

*Hanbury v.
Ella.*

^b Common Law Procedure Act, 1852, s. 222.

^c *Hanbury v. Ella*, 1 A. & E. 61.

Variance and
Amendment.

notice, the judge was considered right in having amended the record, by setting out the real facts accordingly.^d

Wilkin v. Read.

The amendment will not, however, be allowed, except in order to raise the *real question in controversy*,^e when the parties are unable to try this properly, in consequence of its not being correctly raised by the pleadings; for example, where the declaration^f stated that the defendant had *fraudulently misrepresented* that the reason why he had dismissed his clerk, whom the plaintiff was about to take into his service was, that the defendant's business had decreased, whereas he had dismissed him on account of dishonesty; and it appeared by the evidence, first, that the plaintiff, who was about to take into his service a late clerk of the defendant's, had asked the defendant why he had dismissed him, and the defendant had answered, that it was because his business had decreased, and that he had not sufficient work for him; secondly, that this was true; and thirdly, that it was also true, that the clerk had been guilty of embezzlement, but as the plaintiff had asked no questions concerning his honesty, the defendant had said nothing about it; upon the disclosure of this *variance*, the plaintiff applied to have the record amended by striking out of the declaration the allegation of *false misrepresentation* as to the reason of dismissal, and substituting one of the *fraudulent suppression* of the fact of dishonesty; but Maule, J., refused, upon the ground that the real question in controversy, and that which both parties intended to have tried, was not whether the defendant had fraudulently suppressed the clerk's dishonesty, nor even whether the clerk had been dishonest, but whether the defendant had given the plaintiff the true reason for his dismissing his clerk.

^d *Jackson v. Carrington*, 2 C. & Kir. 750; *Burgh v. Legge*, 5 M. & W. 418.

^e What this is, is a question of

fact to be decided by the judge, *Wilkin v. Read*, 15 C. B. 192.

^f *Wilkin v. Read*, *supra*.

The amendment will only be granted upon such terms as to the payment of costs and the adjournment or postponement of the trial, as the justice of the case may require. Where the variance is *substantial*, that is, where the opposite party might have been misled by the pleading as it originally stood, and might be prejudiced in the conduct of his case by the amendment; then the amendment will only be allowed upon the payment of the costs of the day, or otherwise, as the judge may think reasonable, and the adjournment or postponement of the trial, if necessary. It is otherwise, however, where the variance is *trifling*, and the opposite party cannot be reasonably supposed to have been misled; "for," as observed by Mr. Justice Maule, in *Buckland v. Johnson*,^g "where a party makes a mistake in pleading, the opposite party ought to be aware that the power of amendment may and will be exercised, and if he goes down to trial, relying on a mistake not material to the substance of the case, he has no reason to complain of the amendment." Where the above-mentioned principle applies, even a new *count* or *plea* will be added.^h

Variance and Amendment.

The trial, instead of proceeding in the regular course above mentioned, may take several other turns.

In the first place, the party, upon whom the burden of proof falls, begins by laying before the Court and jury a statement of the facts which he proposes to adduce in evidence in support of his allegations; if these facts, even as thus represented to the Court and jury, do not support the propositions he has to maintain, in other words, if his own story, on the face of it, shows that he has not the cause of action or defence set up in the pleadings, the judge will at once bring the case to an end; in case of it occurring to the defendant, by directing the jury that the plaintiff is entitled to their verdict,

Premature termination of trial.

Where the case of the party upon whom lies the onus probandi breaks down.

^g 2 C. L. R. 788; 15 C. B. B. 237; *Taylor v. Shaw*, 1 C. L. R. 1057, Q. B.; *Robson v. Doyle*, 2

^h *Mitchell v. Crassweller*, 13 C. C. L. R. 673, n.

Premature
Termination of
Trial.
—

Plaintiff may
refuse to be
nonsuited.

and if to the plaintiff, by directing him to be *nonsuited*; it being open to either party in such case, if he is dissatisfied with the judge's opinion, either to tender him a *bill of exceptions* or to move the Court for a *new trial*, upon the ground of misdirection.

With regard to the plaintiff, however, he cannot properly be *nonsuited* against his will, and may express his determination to go on to verdict, and in case the judge still insists upon his being *nonsuited*, he may adopt one of three courses:—He may tender him a bill of exceptions;ⁱ or he may submit in deference to the judge's opinion, and afterwards move the Court for a *new trial*, upon the ground of having been improperly nonsuited;^k or, thirdly, he may persist in spite of the judge in going on, and upon the judge ordering him to *be called*, he may answer that he is in Court and ready to proceed.ⁱ However, although the plaintiff may thus insist upon not being *nonsuited*, it would, in general, be imprudent in him to express his determination to go on against the express opinion of the judge; for the latter would necessarily direct the jury in point of law in favour of the defendant, and although the plaintiff might tender a bill of exceptions, or afterwards move the Court for a new trial, yet, in either case, if the opinion of the judge were confirmed, the plaintiff would be barred for ever from bringing another action, whereas, had he submitted to the nonsuit he might, as a matter of right, have at any time brought another action, and have come prepared at that time to meet the defect. And in certain cases he would be allowed, after a nonsuit, to have a *new trial*, if a *fresh action* would be barred by the Statute of Limitations.¹

If, however, the judge is clearly wrong in directing the nonsuit, and the plaintiff knows that he could not come better prepared in another action, the proper course

ⁱ *Corsar v. Reed*, 17 Q. B. 540.

¹ *Ayling v. Goldring*, 1 C. B.

^k *Alexander v. Barker*, 2 C. & J. 635.

133; *Sweet v. Lee*, 3 M. & G. 452.

would be to persist in going on to verdict, and this has been done successfully.^m

Premature
Termination of
Trial.

Supposing that there is no such weakness in the opening of the case of the party who begins, he then proceeds, as before stated, to make good his case by evidence; and here again should the evidence, even if taken most favourably for the party producing it, fail to make good his allegations, the trial is also brought to an end, in precisely the same manner as in the case last mentioned, the plaintiff either being *nonsuited*, or having a verdict in his favour, as the case may be; there is, however, this difference, that in this case, after the party who begins has closed his case, the other can always withdraw the whole from the consideration of the jury, by admitting the truth of all the evidence and demurring to it in the manner already mentioned,ⁿ although this is a very unusual course, the preferable course being to bring the points before the Court in one of the other modes already mentioned, as by bill of exceptions or motion for a new trial, if the judge decides the question himself and will not reserve the point; or by a special verdict, or by a verdict subject to a special case, where the parties can agree upon either of these courses.

Demurring to
the evidence.

In the next place, the matters in issue may at any period of the trial be referred to *arbitration*, with regard to doing which there are again two rules. In all cases the parties may consent to a judge's order, referring the matter to an arbitrator, and conferring upon the arbitrator such powers as may be agreed upon; also whenever it appears to the judge that the dispute turns principally upon matters of mere account, he may, upon the application of either party, refer the matter compulsorily to arbitration.^o

Reference to
arbitration by
mutual con-
sent.

Compulsorily.

Thirdly, where the parties think best to compromise

Compromise.

^m See *Corsar v. Reed*, *supra*, per Lord Campbell.

^o See "Compulsory Arbitration," p. 153.

ⁿ See p. 167, *supra*.

Verdict by
consent.

Discharge of
jury.
Withdrawal of
a juror.

The *postea*.

the matter for any reason, they may either *consent* to a *verdict* for a certain amount being taken, or they may agree to the *discharge of the jury*, or to the *withdrawal of a juror*; in the first case, the verdict has the same effect as if delivered in the regular way. The only difference between their discharging the jury and withdrawing a juror is this, that the withdrawal of a juror puts an end to the action entirely, whereas the discharge of the jury merely puts an end to that trial. In both cases each party pays his own costs, and in the event of the plaintiff bringing a fresh action, the defendant may, if the jury were discharged, plead the pendency of the original action in abatement; and if a juror was withdrawn, he may move the Court to stay the proceedings,^p upon the ground that the consenting to withdraw a juror operates in law as a final end and concord of the dispute.

The trial of the issues being entirely concluded, the *postea* or memorandum of the proceedings is entered on the record, and the latter is then delivered to the party entitled to the judgment of the Court.

The following examples will serve as specimens of the form of the *postea*:—

POSTEA ON A GENERAL VERDICT FOR THE PLAINTIFF.

Afterwards, on the twenty-ninth day of July, A.D. 1856 [the commission day], at Guildford, in the county of Surrey, before Sir Cresswell Cresswell, Knight, and Sir James Shaw Willes, Knight, Justices of our Lady the Queen, assigned to take the assizes in and for the within-named county, come the parties within mentioned, by their respective attornies within mentioned, and a jury of the said county, being summoned, also come, who being sworn to try the matters in question between the said parties, upon their oath say, that the said release was procured by the fraud of the defendant, and they assess the damages of the plaintiff on occasion of

^p *Gibbs v. Ralph*, 14 M. & W. 804.

the premises within complained of by him, over and above his costs of suit, to 100l., and for those costs to 40s. The Postea.

POSTEA ON A SPECIAL VERDICT.

Afterwards, &c., and a jury of the said county, &c., say, that [the facts found by the jury]: but whether or not upon the whole matter aforesaid, by the jury aforesaid in form as aforesaid found, the defendant be guilty as within alleged, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of her Majesty's Court of Common Pleas; and if upon the whole matter aforesaid it shall seem to the said Court that the defendant is guilty as alleged, then the jury aforesaid, upon their oaths aforesaid, say that the defendant is guilty as within alleged, and in that case they assess the damages of the plaintiff by reason thereof, over and above his costs of suit, to 100l., and for those costs to 40s. But if upon the whole matter aforesaid it shall seem to the Court that the defendant is not guilty as within alleged, then the jury aforesaid, upon their oath aforesaid, say, that the defendant is not guilty as within alleged.

After verdict, it frequently becomes necessary to make an application to the judge *to certify*, in order to entitle the party to costs, and for other purposes. Applications to the judge to certify,

The most general of these are the following:—

If the trial has been by a special jury, the party who applied for the special jury will not in any case be allowed the costs of it, unless the judge certify that it was a proper case for a special jury. For special jury.

If the unsuccessful party intends to move the Court, either in arrest of judgment or for a new trial, or otherwise, he should apply for a stay of execution, if there be no opportunity to move the Court within the next fourteen days. To stay execution.

So, also, the successful party may apply for speedy execution. For speedy execution.

execution, which will be granted in all cases where the action appears to have been improperly defended, or the defendant is making away with his goods, or about to quit the country.

Certificate for costs.
13 & 14 Vict.
c. 61, s. 11.

A very common application to the judge is to certify so as to entitle the party to costs. Thus, by the 13 & 14 Vict. c. 61 (County Courts Act), s. 11, if a plaintiff in an action of covenant, debt, detinue or assumpsit, not being for a breach of promise of marriage, shall recover^q *not more than 20l.*, or in any action of trespass, trover or case, except for malicious prosecution, libel, slander, crim. con. or seduction, *not more than 5l.*, the plaintiff, except in the case of a *judgment by default*,^r is deprived of his costs, unless the judge or presiding officer certifies on the back of the record that it appeared unto him at the trial, that the cause of action was one for which *a plaint could not have been entered in the County Court*, or that there was sufficient reason for bringing the said action in the Superior Court.

Application to Court or Judge at Chambers under 15 & 16 Vict. c. 54, s. 4.

The plaintiff who is thus deprived of his costs may also, afterwards, obtain them upon making it appear either to the Court or a judge at chambers, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts, by sect. 128 of the 9 & 10 Vict. c. 95 (County Courts Act), or for which no plaint could have been entered in the County Court, or that the action was removed from the County Court by *certiorari*, or that there was sufficient reason for bringing such action in the Superior Court.

19 & 20 Vict.
c. 108, s. 30.

And now, by the 19 & 20 Vict. c. 108, s. 30, upon a *judgment by default* in actions of contract, *brought to recover a sum not exceeding 20l.*, the plaintiff shall have no costs unless, upon application to the Court or a judge, such Court or judge *otherwise direct*.

^q As to when and how the plaintiff is deprived of costs in cases within the London Small Debts'

Act, see "Costs," *infra*.

^r See 19 & 20 Vict. c. 108, s. 30.

By the 3 & 4 Vict. c. 24, s. 2, the plaintiff, in all actions of trespass and trespass on the case, if he recover less than 40s., is not entitled to costs, unless the judge or presiding officer shall immediately certify^s on the record, writ of trial or writ of inquiry, that the action was brought to try a right besides the mere right to recover damages, or that the trespass or other act was malicious; and sect. 4 also excepts cases of trespass *quare clausum fregit*, after a notice served upon the defendant not to trespass. 3 & 4 Vict.
c. 24, s. 2.

So, also, by the 43 Eliz. c. 6, s. 2, as limited by the last-mentioned act, in all personal actions, not being for any title or interest of lands, nor concerning the freehold or inheritance, nor for a battery, and excepting also actions of trespass and trespass on the case, if the judge certifies that the sum recovered was under^t 40s., the plaintiff shall have no more for his costs than the sum so recovered, and the judge may in his discretion award less. 43 Eliz. c. 6,
s. 2.

^s *Reid v. Ashby*, 13 C. B. 897.

^t *Richards v. Bluck*, 6 C. B. 443.

CHAPTER XIII.

PROCEEDINGS TO JUDGMENT.

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Judgment.

THE issues raised in the action having been decided, the next proceeding is the judgment, which is the sentence of the law upon the whole matters contained in the record.

In ancient times, the judgment was in all cases pronounced by the Court upon a consideration of the matters appearing in the record. In modern times, however, judgment is seldom pronounced by the Court, except

upon issues in law. In other cases, the party *primâ facie* entitled to it signs judgment in the manner hereafter described as a matter of course, and if the opposite party contends that he is not entitled to it, he must bring forward his objection, by way of motion, to the Court.

After a trial in term time, no such motion is allowed after four days from the day of trial, and in no case after that term; and when the trial is in vacation, not after the first four days of the following term, unless the motion is entered in a list of postponed motions by leave of the Court.^a

Motions to the Court before judgment.

Formerly, judgment could only have been signed in term time, and the party unsuccessful on a trial *in vacation* was allowed until the *quarto die post*,^b that is, until the fourth day after the commencement of the following term, in which to move the Court in opposition to the judgment for his adversary.

As a general rule, the officer of the *Nisi Prius* Court gives up the record of *Nisi Prius* to the party successful on the trial, in order that he may sign judgment. Where, however, any further proceedings are about to be taken in the Court *in banco*, which render it uncertain which party will ultimately have judgment, the record will be retained until the final decision of the Court upon such proceedings.^c

Giving up postea to successful party.

The motion will be for one of the following purposes.

^a Reg. Hilary Term, 1853, 50, 51, 53, *infra*.

^b It is supposed that this time was given to suitors as being a reasonable time to travel from distant parts of the country to the Court.

^c Certain other of these ulterior proceedings intervening between the trial and judgment have already been spoken of, namely, the argument upon a *special verdict*,

and upon a *special case* annexed to a general verdict delivered subject to it, and upon a *demurrer to the evidence*.

The bill of exceptions, it will be remembered, does not interfere with signing judgment, nor has the Court the power to take notice of it. The bill can only be taken into account by a Court of Error upon proceedings in *error upon the judgment*.

Motion to vacate judgment.

First, to *enter a verdict or nonsuit*, pursuant to leave of the *Nisi Prius* judge, upon a point reserved by him at the trial; or secondly, for an *arrest of judgment*; or thirdly, to enter a judgment *non obstante veredicto*; or fourthly, for a *repleader*; or fifthly, for a *new trial*; or sixthly, for a *trial de novo*. These motions, then, are made after the trial and before judgment; if it should so happen that after a trial in vacation time judgment is signed before the commencement of the next term, there may be a motion to *vacate the judgment* and then to arrest it, or otherwise as the Court may think fit.

Motion to enter a nonsuit or verdict upon a point reserved.

Upon the motion being made to the Court, unless they are clearly of opinion that there is nothing in the points raised, they grant a *rule nisi*,^d calling upon the opposite party to show cause why a verdict or nonsuit should not be entered, or a new trial had, or as the case may be.

The motions to the Court to enter a *nonsuit* or a *verdict* are respectively made, the former, on the part of the defendant, after a verdict for the plaintiff, to enter a *nonsuit* instead; the latter, on the part of the plaintiff, after a nonsuit or a verdict for the defendant, to enter a verdict for the plaintiff, or by the defendant, after a verdict for the plaintiff, to enter a verdict for him.

In the first place it may be observed, that as against the plaintiff a nonsuit cannot be entered by the Court *in banco*^e after the trial is over; indeed, from the very nature of the nonsuit,^f it is obvious that this cannot be done without the plaintiff's consent;^g and, secondly,

^d See "Motion and Rule," p. 32, *supra*.

^e *Gardner v. Davies*, 1 Wilson, 301.

^f See pp. 163 and 178, *supra*.

^g It is laid down in some books of practice as an unqualified proposition, that a nonsuit can be recorded only at *nisi prius* and not by the Court *in banco*. Such a proposition is, however, not true,

for the plaintiff may certainly be *nonsuited* upon *demurrer* and upon a *trial at bar*; and indeed, after a trial at *nisi prius*, a nonsuit may be entered by the Court upon the request of the plaintiff, and this is sometimes done upon a motion in arrest of judgment in order that the plaintiff may bring another action.

that the Court have no power of themselves to enter a different verdict to that found by the jury, nor to enter a verdict for the plaintiff after a nonsuit. The above motions, therefore, only occur under the following circumstances, namely, when at the trial a doubt or question has arisen upon a point of law, whether in the one case the plaintiff has disclosed a good cause of action, or, in the other, the defendant a good defence; and the judge, not wishing to take upon himself to decide the question, reserves the point and transfers his powers^h of dealing with it at *Nisi Prius* to the Court, in such a manner that their decision upon it shall relate back and have the same effect as if he had himself decided the point at the trial in accordance with their opinion.

Thus, when the question is, whether the plaintiff has a cause of action and whether he ought to be nonsuited, the judge may reserve the point, and either let him go to the jury, and if he has a verdict, give the defendant leave to move the Court upon the point reserved to enter a nonsuit, if they are of opinion that the plaintiff ought to have been nonsuited; or if the point of law is the only matter in dispute between the parties, he may direct a provisional nonsuit, with leave to the plaintiff to move the Court upon the point reserved to enter a verdict.

On the other hand, if the question turns upon a point of law, whether the plaintiff or defendant is entitled to the verdict, the judge may take the verdict of the jury upon the facts, and give the party, against whom the verdict is found, leave to move the Court upon the disputed point of law.

In all these cases the Court *in banco* will have the same power to direct a *nonsuit* or a *verdict* as the judge

^h See p. 170, *supra*. The judge may, if he thinks proper, decide the point at once, and either direct the plaintiff to be *nonsuited* or direct

the jury upon the point according to his opinion, and leave the party dissatisfied with his opinion to move the Court for a *new trial*.

had at *Nisi Prius*, with this additional circumstance, that their decision is final. Upon the same principle, however, that there might have been a motion to the Court for a new trial if the judge had decided the point himself, upon the ground of incorrect decision of the judge, so upon the above motions the Court, if they think such course desirable, will order a new trial to be had.

Arrest of judgment.

If after a verdict or interlocutory judgment for the plaintiff, it appears *on the face of the record*ⁱ that he has no right to maintain his action, and that judgment in his favour would be erroneous, and such as would be reversed by a Court of Error, the Court will *arrest the judgment*. And this may be either where the declaration itself discloses no cause of action, or where after a good plea or subsequent pleading of the defendant in confession and avoidance the replication or other pleading of the plaintiff affords no answer to it.

The Court, however, will not arrest the judgment, unless they are clearly of opinion that the plaintiff has no right of action upon the facts disclosed on the record. Where they are not clear that this is so, the plaintiff will have his judgment, and the defendant will be left to proceed in *error* if he thinks fit.^k

Ancient rules.

In ancient times, before the Statutes of Jeofails, a party might have been entirely overthrown by *demurrer*, on account of defects and omissions of mere form in his pleading; and in like manner, after the judgment of the Court had been recorded, it was liable, as a general rule, subject to the exceptions presently mentioned, to be *reversed*^l by a higher Court for all such errors appearing in the face of the record; the Courts, therefore, would always *arrest* their judgment when they felt satisfied that if recorded it might afterwards be reversed in a higher Court. As, however, the Courts looked back at

ⁱ *Pechey v. Harrison*, 1 Lord Raym. 232.

^k *Blackater v. Gillett*, 9 C. B. 26.

^l 2 Reeves, 448.

the whole record, and took into account all the matters appearing thereon, it frequently happened that omissions in a pleading, which might have been successfully taken advantage of by demurrer to the pleading, were even at common law waived or cured by subsequent pleadings^m or aided by the verdict.ⁿ For example, where in trespass for obstructing a way, the count did not state the vill or county, but the defendant merely pleaded *not guilty*, the uncertainty was waived and cured by the pleading over; so, again, where in trespass for taking a chattel the count did not state that it was in the plaintiff's possession, but the defendant in his plea justified taking it *out of the plaintiff's hand*, here, an omission, which would have been fatal on demurrer, was supplied.

Defects cured
by pleading
over.

And with regard to defects and omissions being aided by the verdict, the rule is stated to have been this,^o that if after any defect, imperfection or omission in any pleading, the issue joined were such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it was not to be presumed that the judge could have directed the jury to give or the jury would have given the verdict returned, such defect was cured by the verdict, and was, in fact, no *jeofail* after verdict.

Defects aided
by verdict.

However, by the statutes^p of special demurrers, which were passed with a view to discourage merely technical objections, it was enacted that the Courts should give judgment according as the very right of the cause and matter in law should appear unto them, *without regarding* any imperfection, omission, defect or want of form, except those only which the party demurring should specially and particularly set down and express with his demurrer; and it was decided after this statute, that

Statutes of
Jeofails.

^m Com. Dig. Pleader, c. 85, E. 37.

ⁿ Com. Dig. Pleader, c. 87, E. 38; 1 Wms. Saund. 227, n.

^o 1 Wms. Saund. 228, note 1.

^p 27 Eliz. c. 5, amended by 4 Ann. c. 16. See also "Jeofails," p. 94, *supra*.

Common Law
Procedure Act,
1852, ss. 50, 51.

There must be
substantial
error on the
record.

Rule as to
omissions.

after passing by a pleading without demurring, no advantage could afterwards be taken of any defect that could not have been taken advantage of upon general demurrer.^q And now, by virtue of the Common Law Procedure Act, 1852, sects. 50, 51, no objections that could have been only taken by special demurrer can be taken by demurrer^r at all, nor can any judgment be arrested, stayed or reversed for any imperfection, defect in, or lack of form.

Judgment, therefore, can only be *arrested* at the present day upon the ground of *substantial error on the record*.^s When the defendant moves for an arrest of judgment upon the ground of the omission of some matter of allegation or denial by the plaintiff, not only must the subject-matter of the alleged omission be material, but the omission of it on the record must be so complete, that the *verdict* for the plaintiff upon the *issue actually raised* on the record might have been correct, consistently with the subject-matter of the omission or alleged omission being against him.

The rule thus stated in the abstract is certainly rather abstruse; it will be better therefore to put it also in the converse. In the first place, the jury have nothing to do with the goodness or badness of the issue; and whether this is material or immaterial to the merits of the case, their duty is simply to decide upon the truth of the facts actually put in issue by the parties on the record. Now, if the matter alleged by the defendant to be omitted is yet so far contained in the record, by necessary *implication* from other matters appearing thereon, that the *issue actually raised* could not have been *correctly* found in favour of the plaintiff, unless the

^q 2 Salk. 519, *per* Holt, C. J.

^r The only way in which informalities and improprieties in the mode of drawing the pleadings can now be rectified is by application

to a judge or the Court to order an amendment.

^s See "Error in Law and Error in Fact," *infra*; *Pechey v. Harrison*, 1 Lord Raym. 232.

subject-matter of the alleged omission were also in his favour, the Court after a verdict for the plaintiff will not consider such matter to have been substantially omitted.^t The question in such case will always be this:—Having regard to the actual issue raised, can a verdict thereon for the plaintiff be right if the matter alleged to have been omitted is against him? if not, then the matter is *not* omitted; if it might, and the fact is *material*, then it *is* omitted, and judgment may be arrested.

Where some of the counts are good and some bad, the Court will arrest the judgment on the bad counts, if the damages have been assessed separately on them, otherwise there must be a *trial de novo*.

A motion for judgment *non obstante veredicto*, *i. e.* notwithstanding the verdict, is a motion on the part of the plaintiff, after a verdict for the defendant, in the case where the latter has pleaded in *confession and avoidance*, and the matter alleged in avoidance is insufficient in point of law, and the plaintiff instead of demurring has answered the matter of avoidance.

Judgment non obstante veredicto.

In such case the Courts will give the plaintiff judgment as upon the confession of the defendant, notwithstanding the trial having terminated in favour of the defendant, since he has, by his plea, confessed the declaration, and attempted to avoid it by a defence, which, even if true, affords by the hypothesis no answer to the plaintiff's claim.^u

The defendant in *replevin*, being in the position of a plaintiff in an ordinary action, may have judgment under similar circumstances.^x It has been doubted whether the defendant might not have this judgment, where there has been a pleading by the plaintiff in *confession and avoidance*, which does not avoid the defence.^y As a

^t *Jackson v. Pesked*, 1 M. & S. 234, where the rule is laid down by Lord Ellenborough even more favourably for the plaintiffs than the author has put it.

^u *Lambert v. Taylor*, 4 B. & C. 138.

^x 2 B. & P. 376.

^y *R. v. Darlington School*, 6 Q. B. 682.

rule, no doubt the Court will, in such case, merely arrest the judgment.²

There must be a clear confession and no avoidance.

To entitle the plaintiff to judgment *non obstante*, the plea must have unequivocally confessed the declaration, and the defence must appear on the face of the record to be bad.

The plaintiff will sometimes move to enter this judgment even where the verdict is in his favour, because, in strictness, to avoid error on the record, the judgment in such case should be as upon *confession*, and not upon the verdict.

In the cases to which the *arrest of judgment* or the *judgment non obstante* are applicable, the defendant or the plaintiff, as the case may be, might, during the time of pleading, have demurred to the defective pleading of his opponent; where, however, the facts therein stated are false, or if true, avoidable, it might be preferable to plead rather than demur; at the present day, the proper course would be in such a case to apply for leave to plead and demur together.

Suggestion of omitted matter on the roll.

Upon a motion in *arrest of judgment*, or to enter judgment *non obstante*, the party whose pleading is alleged to be defective may, by leave of the Court, suggest^a the existence of the omitted matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to by the opposite party, within eight days after notice thereof, and the issues raised thereon will be tried in the ordinary way, and judgment will follow the result. The Courts will also even at this stage make any amendments in the record that are necessary to raise thereon the real question in controversy between the parties.

Amendment.

It is sometimes assumed that one of the reasons for the *arrest of judgment* and for the *judgment non ob-*

² *Rand v. Vaughan*, 1 Bing. 1852, ss. 143, 144; *Manley v. Boycott*, 2 El. & Bl. 46, 128, n. N.C. 767.

^a Common Law Procedure Act,

stante, is the *immateriality of the issue*, and consequent immateriality of the verdict.

This, however, is not correct; the immateriality of the issue in these cases is merely a necessary accident to and not of the essence of the defect, that is to say, although it always is so and must be so, it is no part of the reason for the arrest of judgment or the judgment *non obstante* respectively, nor is it a point to be regarded. The only true grounds are those already stated, namely, when it appears on the face of the record that the plaintiff is not entitled to maintain his action, the Court will *arrest the judgment*, and when the defendant has on the record clearly confessed the declaration, without disclosing a sufficient avoidance, the Court will give judgment for the plaintiff notwithstanding a verdict for the defendant.

The parties, however, may have gone down to trial upon an *immaterial issue*,^b that is, one that will not determine the cause on the merits, and yet the plaintiff not be entitled to judgment *non obstante veredicto*, nor the defendant to an *arrest of judgment*; for example, suppose the plaintiff has taken issue upon a plea which is bad, but which does not confess the whole declaration,^c in such cases the Court can only award a *repleader*, that is to say, a rule directing the parties to plead over again, commencing with the first bad pleading.

They will not, however, grant a repleader upon the motion of that party who first pleaded badly; and upon all these motions the Court will look back at the whole record, and will not merely confine their attention to the pleading objected to, and they will be guided as to the rule they will grant by the right of the parties as they appear upon the whole record, without regard to the party moving.

^b *Sergeant v. Fairfax*, 1 Lev. 32; 2 Mod. 137; and see 2 Wms. Saund. 319, note 6.

^c See *Fillieul v. Armstrong*, 7 A. & E. 557.

New trial.

For mistakes of judge.

The motion for a *new trial* is always founded upon matter extrinsic to and not appearing upon the record.

In the first place, a new trial may be granted upon the ground of the judge having improperly admitted or rejected evidence, or having misdirected the jury, or having improperly directed the plaintiff to be *nonsuited*, or incorrectly decided any matter arising upon the trial, which may have affected the result of the trial, for example, as by improperly refusing to amend, or deciding wrongly on the right to begin.^d

To entitle a party to move for a new trial upon any of these grounds, the point upon which the objection is raised must have distinctly presented itself at the trial; and must not have been waived by the party moving.^e

Whenever the direction or other matter objected to could not have affected the verdict, no new trial will be granted, notwithstanding that the judge acted wrongly;^f for example, where evidence has been improperly admitted, but the verdict was abundantly supported by other evidence.^g

A new trial will also in certain cases be granted where the judge does not give the jury a sufficient direction,^h or where it appears that the jury clearly misunderstood the judge, although his direction was right.ⁱ

Where the party has tendered a bill of exceptions, a new trial will not be granted upon any ground that is

^d *Brandford v. Freeman*, 5 Exch. 734.

^e It is stated in certain books of practice, that the *objection* must, in all cases, be distinctly *taken at the trial*; the authorities, however, do not support this proposition. It seems only to be necessary to take the objection at the trial when the point would not otherwise arise for consideration; or when the point is actually discussed and silence would be clear acquiescence, and a

waiver of the objection. See *Hardman v. Bellhouse*, 9 M. & W. 596, 598; *Martin v. Great Northern Railway Company*, 24 L. J., C. P. 209; *Doe v. Strickland*, 8 C. B. 725; *Morrish v. Murray*, 13 M. & W. 52.

^f *Bessey v. Windham*, 6 Q. B. 166.

^g *Horford v. Wilson*, 1 Taunt. 12; see 6 Bing. 561.

^h *Hadley v. Baxandale*, 9 Exch. 341; 2 C. L. R. 517.

ⁱ *Toulmin v. Hedley*, 2 Car. & Kir. 157.

or might have been included in the bill, unless he withdraws it.^k

Secondly, a new trial may also be granted upon the ground of some *defect* in or *misconduct of the jury*, or a clear impropriety in the verdict. The general rule is, that the verdict of the jury is final and cannot be disputed; to this, however, there are a considerable number of exceptions. Thus, where it turns out that one of the jurymen was interested^l in the cause or was sworn under a false name.

Upon grounds relating to the jury.

So, also, if the jury determine their verdict with gross levity and impropriety, as by casting lots;^m or if any of them have accepted of any present or hospitality during the trial from the party for whom they deliver their verdict; or if they have been improperly influenced either by the conduct of one of the parties, or otherwise, as in the case of evidence being given to them which was not given to the Court, or handbills being circulated amongst themⁿ by any one, or where the judge makes improper observations at the commencement of the trial and refuses to postpone it.

Jury casting lots.

So, also, where the verdict is clearly contrary to the weight of evidence,^o unless in the case of a hard or vexatious action,^p or where the jury deliver a perverse verdict^q and quite contrary to the opinion of the judge, and especially if actuated by improper feelings.^r

Verdict contrary to evidence.

In the next place, a new trial may be obtained when

^k *Minchin v. Clement*, 1 B. & Ald. 252; *Adams v. Andrews*, 20 L. J., Q. B. 39.

^l *Bailey v. Macaulay*, 19 L. J., Q. B. 73.

^m *Dent v. Hertford*, 2 Salk. 645; *Morris v. Vivian*, 10 M. & W. 137. Affidavits of the jurymen are however not admissible to prove such misconduct; see *Vaise v. Delavel*, 1 T. R. 11; *Roberts v. Hughes*, 7 M. & W. 399; see 7 D. P. C. 223.

ⁿ *Coster v. Merest*, 3 B. & B. 272.

^o *Musgrave v. Nevinson*, 2 Lord Raym. 1358.

^p *Reaveley v. Mainwaring*, 3 Burr. 1306; 1 Burr. 11, 54; 4 T. R. 468; 3 B. & Ald. 692.

^q *Harrison v. Fane*, 1 Scott's N. R. 287; *Parker v. Great Western Railway Company*, 3 Railw. Cas. C. P. 17.

^r *Davies v. Roper*, 2 Jur. (N. S.) 167.

Damages excessive or inadequate.

the jury give excessive^t or grossly inadequate^u damages; and in applying this rule a great difference is made between actions arising *ex contractu* and those *ex delicto*; in the former the measure of damages^x being in general capable of being reduced to rule, the Courts more readily entertain a motion for a new trial on account of an impropriety in the amount of damages.

In actions *ex delicto*, generally, the measure of damages is less capable of being reduced to rule, and in certain cases, as in injury to character, incapable of being reduced to any rule at all; in the latter class of cases, therefore, the Courts are very reluctant to disturb the decision of the jury, it being considered to be their peculiar function to determine the amount of damages where there are no clear rules to go by, and in these cases no new trial will be allowed, unless the damages are outrageous or grossly inadequate.^y In actions brought simply for injury to property, the measure of damages is more capable of being governed by general rules, and in such cases the Courts will entertain the motion in the same manner as in cases arising *ex contractu*.

On account of perjury.

On discovery of new evidence.

Or surprise.

A new trial will also be granted where the verdict was obtained by perjury,^z or a mistake of a witness;^a or if new evidence be discovered after the trial which the party did not know of before, and which if it had been produced at the trial must have given him the verdict;^b or where the party was taken by surprise,^c as by means

^t *Creed v. Fisher*, 7 Exch. 472.

^u *Apps v. Day*, 14 C. B. 112.

^x See "A Treatise on the Measure of Damages," by J. D. Mayne. A masterly work on this subject, and one written with singular clearness.

^y *Clerk v. Udall*, 2 Salk. 649, and note ^a; *Merest v. Hervey*, 5 Taunt. 442, in which is mentioned a case where the jury gave the plaintiff 500*l.* for having his hat knocked off, and the Court refused to disturb it. *Williams v. Currie*, 11 M.

G. & Scott, 841.

^z *Fabrilus v. Cock*, 3 Burr. 1771; *Honeyman v. Lewis*, 23 L. J., Exch. 204.

^a *Richardson v. Fisher*, 1 Bing. 145.

^b *Thurtell v. Beaumont*, 1 Bing. 339.

^c See generally as to surprise, *Todd v. Emley*, 2 Dowl. N. S. 570; *Hoare v. Silverlock*, 12 Q. B. 624; *Bailey v. Macaulay*, 13 Q. B. 815; *Lewis v. Trussler*, 2 C. L. R. 727.

of a trick on the part of the other side, and an unjust verdict was thereby obtained thus, where there was no notice of trial, or where in the casual absence of the counsel and attorney of the defendant the cause was taken out of its turn upon its being represented by the other side to be undefended,^c or where a party refused to admit a document in evidence that he had agreed to admit.^d

Where there has been a failure of justice by reason of the default of an officer of the Court, as by entering a cause by mistake as an undefended cause, a new trial will be granted. Default of an officer of Court.

A second new trial will very rarely be granted even in cases where the amount of damages on the second trial is the same as on the first.^e The Courts, however, are more inclined to grant another trial in actions affecting title to real property than in other cases.^f Second new trial.

When there is a new trial it takes place in precisely the same manner as an ordinary trial, the parties have the same time to proceed as after issue joined; and one *postea* only must be entered upon the record, and if the *postea* had already been entered after the first trial a new record must be made up.

A motion for a *trial de novo* is founded upon some error appearing on the *record of the verdict*, and which cannot be amended.^g Thus, if the jury have omitted to assess the damages; or where a special verdict is so imperfect that the Court cannot give judgment upon it; or where the damages have been assessed generally on two or more counts, some of which are good and others bad.^h Trial de novo.

Although formerly there was a distinction between a *new trial* and a *trial de novo*, there is, in fact, none at the present day. However, the grounds upon which

^c See cases of *Harrison v. Fane*, 1 Scott's N. R. 287; see 1 Burr. 352.

^d 5 Dowl. 420.

^e *Clerk v. Udall*, 2 Salk. 649.

^f *Lee v. Shore*, 1 B. & C. 94; *Davies v. Roper*, 2 Jur. (N. S.) 167.

^g 7 T. R. 52. See also as to amendment of verdict, Lush's Practice, Amendment, and p. 95, above.

^h *Tancred v. Christie*, 12 M. & W. 316.

they will be respectively awarded are different, and the two terms are still kept up.

Two or more of these motions may be combined together when applicable; for example, an application may be made for a new trial, or failing that, for an arrest of judgment; however, a *new trial* cannot be applied for *after* a motion recognizing the verdict, such as a motion in arrest of judgment, or for judgment *non obstante veredicto*.

Signing judgment.

The party entitled to it now *signs judgment*, which he does in the following way: in the first place he procures the record of *Nisi Prius*, and if the *postea* is not already entered thereon he then enters it, together with a statement that the justices of *Nisi Prius* have sent to the Court their record of the proceedings, and then concludes with the operative part of the judgment, as follows:—

Judgment roll.

Therefore it is considered that the plaintiff [or the defendant, as the case may be], do recover against the defendant the said moneys by the jurors aforesaid assessed [or as the case may be]. And in the margin of the roll opposite the judgment is inserted this memorandum—Judgment signed the —— day of ——, 18— [being the day of signing final judgment].

This constitutes the *judgment roll*, and when drawn up it is taken to the officer of the Court who stamps it with the official seal denoting that *judgment is signed*, and at the same time enters the judgment of record in the Court.

Taxing costs.

In case there is a judgment for costs, the signing judgment is not complete until the amount of the costs have been *taxed* or assessed by the *taxing master*.

If this is done before the judgment is signed as above mentioned, the taxing master delivers his certificate or *allocatur* of the costs to the party, upon the authority of which the amount may be inserted in the judgment when it is signed: if the costs are not taxed until afterwards a blank is left for them, and the taxing master will insert the amount.

It is not necessary, however, in order to issue execution, thus to enter the judgment formally on a roll.ⁱ Formal judgment not necessary.

An *incipitur*, or commencement merely, of the formal record may be made on a piece of paper shortly describing the nature of the judgment, and this may be taken and stamped in like manner as the roll, and it will be a sufficient authority upon which to issue execution. And when judgment has been thus signed the formal judgment may afterwards, at any lapse of time, be made up from the memorandum remaining in Court, if the record should be required for evidence, or bringing error, or the like.

Execution may issue immediately upon signing judgment, and the time for signing judgment is fourteen days after the verdict unless the judge otherwise order. Time for signing judgment.

Where judgment is signed otherwise than upon a verdict, the very state of things that gives the right to the judgment also determines the time when it may be signed; thus judgment by *default* or judgment of *non pros.*, and the like, are signed at the time the party has the right to such judgment.^k

Judgment may also be signed at any time, whether in term or vacation, and it is entered of record of the date of the day of the month and year that judgment was completely signed, and this is so whether the roll has been made up or not.^l Nor will the Court allow a judgment to be antedated or entered *nunc pro tunc*, unless in the case of delay caused by the Court or one of its officers.

The judgment for the plaintiff is usually *quod recuperet*, that he do recover his debt or damages and costs; that his goods or lands be restored to him; or that a mandamus or injunction do issue.

The usual judgment for the defendant is, that the

ⁱ Reg. Hilary Term, 1853, r. 70, &c.," p. 201, *infra*.
infra; Common Law Procedure Act, 1852, s. 206.

^l Reg. Hilary Term, 1853, r. 56, *infra*.

^k See "Judgment by Default,

plaintiff take nothing by his writ, and that the defendant do recover his costs of defence.

Upon a plea in abatement the judgment for the plaintiff upon verdict is, *quod recuperet*; and upon demurrer *respondeat ouster*, that the defendant do answer the action: and for the defendant, in all cases, *cassetur breve*, that the plaintiff's writ be quashed.

Judgment final
or interlocu-
tory.

The judgment, in the first instance, is either *final* or *interlocutory*, the meaning of which is this: Whenever, upon judgment being signed, there is nothing further to be determined either as to the exact amount of money to be recovered or otherwise, then the judgment is *final*, and execution may issue at once; if, however, at the time judgment is signed, the amount to be recovered is still unascertained, as it may be upon the decision of an issue in law, or after a trial by the Court, or upon judgment by default, and the action is for *damages*, the judgment is *interlocutory* only in the first instance, namely, that the plaintiff do recover his damages, without stating the amount; and final judgment cannot be signed nor execution issue until the amount has been assessed either by a jury, upon a *writ of inquiry*, or by the master upon an order of reference.

Writ of in-
quiry.

The writ of inquiry is in such case issued to the sheriff, or, in important cases, to a judge sitting at *Nisi Prius*, commanding them to cause a jury to be summoned and to have the matter inquired into, and to return the writ with the assessment or *inquisition* of the jury. Upon the return of the writ final judgment may be signed for the amount assessed.

Reference to
the Master.

When the amount of the damages is substantially a matter of calculation, it is not necessary to issue a writ of inquiry, but the Court or a judge may direct the amount to be ascertained by one of the masters of the Court, who will indorse the amount on the order of reference and deliver it to the plaintiff.^m

^m Common Law Procedure Act, 1852, s. 94.

Hitherto the action has been supposed to have proceeded regularly to issue, and to trial or argument, and lastly, to judgment. There are, however, a great variety of ways in which the cause may prematurely terminate, either in favour of the plaintiff or of the defendant, or without giving the victory to either party, and such termination is, in some cases, by a judgment of the Court, in others, not.

Premature terminations of cause.

In the first place, if the defendant fails to appear to the writ, the plaintiff has *judgment by default*. After this judgment, however, the defendant may yet be allowed to appear and defend, upon an affidavit, that he has a *defence upon the merits*.ⁿ Leave, however, will only be granted upon such terms as will place the plaintiff in the same position as if the action had originally proceeded in the regular way.

Judgment by default,

In the case of judgment being signed in an action upon a bill of exchange or promissory note, commenced by the special writ,^o the defendant will only be allowed to appear and defend under *special circumstances*,^p which is to be understood to mean something more than a defence on the merits, namely, disclosing a reason for not applying sooner for leave to appear.

If the defendant at any stage fails to plead, the plaintiff has judgment by *nil dicit*, *i. e.* for *want of a plea* or rejoinder, or as the case may be.

by nil dicit,

The defendant may also voluntarily *confess* the declaration, though this is seldom done unconditionally; it generally takes place when the defendant, not wishing to dispute the action, is anxious to obtain further time for payment, and at the same time to save further expense in litigation. There are three different modes of doing this.

by confession.

ⁿ See *Sisted v. Lee*, 1 Salk. 402, and p. 127, *supra*. The pleas of *bankruptcy*, *infancy* and *Statute of*

Limitations are defences on the merits.

^o See p. 76, *supra*.

^p 18 & 19 Vict. c. 67, s. 3.

Judge's order
to sign judgment.

In the first place, the defendant may enter into an agreement with the plaintiff, engaging to pay the money by instalments or otherwise, as they may agree, and at the same time consenting to a *judge's order to sign judgment* immediately upon any default.

A judge has, at any time, power to make such an order, if the defendant has given his consent, though not otherwise; and, where the defendant has not appeared or has appeared in person, such consent must be in writing and signed, and witnessed by an attorney acting in behalf of the defendant, and who has explained to him the nature of the instrument; or the defendant may attend the judge at chambers, and give his consent in person.^P

Warrant of attorney.

Secondly, one may at any time, either before or after the commencement of an action, give to another a *warrant of attorney to confess* and enter up judgment in an action. By this instrument the party appoints a certain attorney therein named to be his attorney, and empowers him to accept a writ and confess judgment for him in a certain action at the suit of a party for whose benefit the power of attorney is granted. The terms and conditions upon which it is given are introduced in the form of a memorandum by way of defeazance, by which it is agreed and provided that no action shall be brought or judgment signed until after a breach on the part of the debtor of one of the terms or conditions.

Cognovit.

Thirdly, the defendant gives the plaintiff a *cognovit actionem*, or a confession of the action, authorizing the plaintiff to sign judgment if the defendant fails to pay, or otherwise as the case may be. This instrument, although always *supposed* to be given after the declaration, may be given at any time, and even before the writ has been served, and it authorizes the plaintiff to take all necessary steps to obtain judgment in case of a default.

Like the consent to a judge's order, these instruments,

^P R. H. T. rr. 156, 157, *infra*.

also, must be witnessed by an attorney on behalf of the defendant.^q

The defendant may also, at any time, by a *retraxit*, withdraw his plea and other pleadings, or, which comes to the same thing, by a *relictâ verificatione*, relinquish his plea, and confess the action.

Retraxit.

Relictâ verificatione.

In all the foregoing cases the plaintiff is said to have judgment upon confession; of which nature, also, is the judgment *non obstante veredicto*.

In the next place, the defendant's attorney may answer that he is not instructed as to the defence, in which case the plaintiff is said to have judgment upon *non sum informatus*.

Non sum informatus.

On the other hand, the cause may terminate in favour of the defendant. Thus, if the plaintiff, at any stage of the proceedings, fails to proceed within the time allowed, the defendant has judgment of *non prosequitur*.

Non pros.

The plaintiff, also, after a plea in abatement, if he cannot deny the truth of it, nor amend his declaration, may apply for an order *quod cassetur breve*, that his writ may be quashed, and this will save him the costs.

Cassetur breve.

Again, in like manner, as the defendant may confess the action, the plaintiff may confess the defence, though this will very rarely happen except in one case, namely, where there is a plea of matter arising after the commencement of the action, in which the plaintiff may confess the plea, and he will then be entitled to judgment for his costs.

Confession of plea.

In the next place, if the plaintiff is unwilling, for any reason, to proceed either with a part of his claim, or against one or more of the defendants, he may enter a *nolle prosequi*,^r or he may obtain a rule to *discontinue*

Nolle prosequi.

Discontinuance.

^q See 3 Bl. Comm., Warrant of Attorney, 317, Cognovit, 304; and 1 & 2 Vict. c. 110, ss. 9, 10; Reg. Hilary Term, 1853, r. 27.

^r However, although the *nolle*

prosequi is strictly appropriate only to the case of a partial withdrawal by the plaintiff, he certainly may enter a *nolle prosequi* to the whole.

Retraxisit by
plaintiff.

the action, or he may enter a *retraxisit* or withdrawal of the whole of his claim.

The substantial difference between the above modes of terminating the action in favour of the defendant, is in the amount of costs falling upon the plaintiff in each case, with, however, this additional distinction, that a *retraxisit* and a *confession* operate as a bar for ever to any future action for the same cause, whereas, the others do not, except, indeed, a *nolle prosequi* after judgment,^s which has the same effect as a *retraxisit*.

Nature of dis-
continuance.

The *discontinuance* of the action originated in the ancient practice of *continuing* or adjourning the proceedings by means of formal entries on the roll,^t a neglect of which caused a discontinuance of the action, and placed the parties and the cause out of Court. Although all such entries are now abolished,^u the plaintiff may still cause the action to be *discontinued*, by obtaining a rule for that purpose. Before a verdict or execution of a writ of inquiry, or argument and allowance of a demurrer,^x a rule for a discontinuance, upon payment of costs, is a rule as of course, but after these periods, or without paying costs, it can only be had by the express leave of the Court.^y

Stet processus.

In the next place, the parties may agree to the entry of a *stet processus* upon the record, by which all further proceedings are stayed, and each party pays his own costs.

Stay of pro-
ceedings.

Lastly, the Court will, in certain cases, order *further proceedings to be stayed*. When in actions for liquidated demands, the defendant pays the sum claimed and costs within four days of the service of the writ, he has a right to a stay of proceedings.^z In numerous other cases, also, the defendant may obtain a stay of proceed-

^s 1 Wms. Saund. 207, note 2.

& W. 8.

^t See p. 90, *supra*.

^y Lush's Practice, 682.

^u Reg. Trinity Term, 1853, r. 31.

^z See "Writ of Summons" and

^x *Benton v. Polkinghorne*, 16 M.

"Indorsements," p. 74.

ings upon application to the Court or a judge, as where the action is frivolous^a or brought against good faith,^b or vexatiously brought a second time.^c

The termination of the action by *nonsuit*,^d *demurrer to the evidence*,^e *discharging the jury*,^f *withdrawal of a juror*,^g and by a *reference to arbitration*,^h have already been mentioned.

When one of the parties spontaneously yields to the other, he prepares a written memorandum,ⁱ setting out his confession or his unwillingness further to prosecute his suit, or as the case may be, and delivers it to his opponent in the same manner as a pleading.

The *retraxit*, however, like the nonsuit, is always supposed to take place in open Court, consequently, when either party takes this course, the writing above mentioned merely contains an undertaking to withdraw the plea or other pleadings, as the case may be.

After the delivery of such written confession, abandon-

Entry on record.

^a *Kennard v. Jones*, 4 T. R. 495.

^b 2 D. & L. 18.

^c 2 T. R. 511 n.

^d See pp. 163, 178, *supra*.

^e See p. 167.

^f See p. 180, *supra*.

^g See p. 180, *supra*.

^h See pp. 153, 179, *supra*.

ⁱ The following form of a simple *cognovit actionem* will serve as an example:—

In the Queen's Bench.

Between A. B. and C. D.

I confess this action, and that the plaintiff is entitled to recover against me therein the sum of 100l. besides his costs of suit, to the amount of 10l. [or, as between attorney and client, to be taxed by one of the masters]. Now this confession of the above action is made and given upon the condition and understanding that judgment shall not be signed unless I make default in the payment of the said sum of 100l. and the said

costs upon the — day of — next ; and in case I then make default in the payment of the same, the plaintiff shall be at liberty to enter up judgment for the said sum, together with the said costs, and also the costs of entering up such judgment and registering the same.

Dated the — day of —, 1856.
C. D.

Signed by the above-named C. D. in my presence, and I declare myself to be attorney for the said C. D., and that I subscribe my name as such his attorney.
J. E. P.

It is usual also in *cognovits* to insert other provisions, as to not proceeding in equity or in error, &c. See *Webb v. Taylor*, 1 D. & L. 676, 686 ; 2 A. & E. 368 ; see also Chitty's Forms, "*Cognovit Actionem*."

ment or undertaking, the party to whom it is delivered, in due time and according to the terms thereof, signs judgment, relating on the record such act of his opponent, in the third person, in the same form as in ancient times it would have been entered on the roll by the officer of the Court, upon the party making such confession or declaring his wish not to proceed further with his suit, or otherwise according to fact, for example:—

Form of re-
traxit.

ENTRY OF A RETRAXIT OF PLEA AND REJOINDER,
AND JUDGMENT THEREON.

Afterwards on the seventh day of May, 1856, come here as well the plaintiff as the defendant by their respective attornies aforesaid. And hereupon the defendant relinquishes the said rejoinder and the said plea of the defendant by him above pleaded, and says that he is unable to deny the declaration and replication of the plaintiff, or that the plaintiff is entitled to recover against him in the said action, the said claim of the plaintiff, besides his costs of suit. Therefore it is considered that the plaintiff do recover,¹ &c.

Recapitulation. To recapitulate the various modes in which the action may terminate, they are as follows:—

- A. In judgment for the plaintiff.
 - a. by default.
 - b. upon a judge's order by consent.
 - c. upon a *cognovit actionem*.
 - d. upon warrant of attorney.
 - e. by *nil dicit*.
 - f. by *non sum informatus*.
 - g. upon a *retraxit* and confession.

¹ Where the action is for damages, and the defendant simply confesses the action, the plaintiff must proceed to have the damages

assessed upon a writ of inquiry or a reference to the master. See p. 200, *supra*.

- A. In judgment for the plaintiff—*continued*.
- h. upon decision of issue of fact or law or both.
 - by the Court.
 - by verdict of jury.
 - by verdict of judge.
 - by award of arbitrator.^j
 - i. *non obstante veredicto*.
- B. In judgment for the defendant.
- a. of *cassetur breve*.
 - b. of *non pros*.
 - c. upon a *nolle prosequi*.
 - d. upon *retraxit*.
 - e. of *non suit*.
 - f. upon decision of issue of law or fact or both.
 - by the Court.
 - by verdict of jury.
 - by verdict of judge.
 - by award of arbitrator.
- C. In favour of neither party.
- a. by act of the Court.
 - judgment of *cassetur breve* upon motion of plaintiff.
 - stay of proceedings.
 - arrest of judgment.
 - b. by act of the parties.
 - discontinuance by plaintiff.
 - stet processus* by consent.
 - withdrawal of juror by consent.
 - discharge of jury by consent.

By the Statute of Westminster the second, 13 Edw. I. st. 1, extended and modified by sects. 10—16 of the Statute of Frauds, 29 Car. II. c. 3, judgments were made a charge upon one-half of the lands of the debtor,

Judgments a charge upon lands.
Statute of Westminster 2, and Statute of Frauds.

^j This includes only those cases in which the issue is referred to an arbitrator for decision. Where at the trial the verdict is taken subject to a reference, this is strictly a case of judgment *upon a verdict*.

and the process of *elegit*^k was framed in order to make the charge available to the creditor. Under this writ it was the duty of the sheriff to summon a jury to assess the value of the goods and the *annual*^l value of the lands of the debtor, and if the goods were not sufficient to discharge the debt, to deliver the *legal* possession of a moiety of the lands to the creditor, and to return the writ with the inquisition of the jury into Court. The creditor then became *tenant by elegit* of such moiety of the land, his title dating from the return of the inquisition, he then became entitled to hold the land to himself, his executors,^m administrators and assigns, subject to the interest of any others than the judgment debtor, until the satisfaction of the debt, and he might have maintained ejectment for the land, if the debtor refused to allow him to enter and take actual possession.

If, however, the judgment creditor delayed to avail himself of this charge, subsequent purchasers for valuable consideration, without notice thereof, were in certain cases protected against it, and an injunction would have been granted by a Court of Equity restraining him from proceeding in ejectment as against such purchaser.ⁿ

1 & 2 Vict.
c. 110, s. 13,
all lands
charged.

By the 1 & 2 Vict. c. 110, s. 13,^o judgments are made a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments, including copyholds, which the debtor at the date of the judgment or afterwards is seised or possessed of or entitled to for any estate in law or equity, in possession, reversion, remainder or expectancy, or over which he has an absolute disposing power, and the charge is to be binding against

^k See "Elegit," *infra*.

^l 2 Inst. 396.

^m His estate is only a *chattel* estate. 2 Inst. 396.

ⁿ It is almost unnecessary to remind the student that *mortgages*, and persons taking under a *pre-nuptial* marriage settlement,

are *purchasers* for a valuable consideration.

^o And by sect. 11, the process of *elegit* is extended to all the real property of the debtor, capable of being delivered. See "Elegit," *infra*.

all persons whose estate or interest the debtor himself has power to bar.^p

It is, however, provided that the act is not to be taken to alter or affect the doctrine of equity, whereby protection is given to *purchasers for valuable consideration without notice*. Purchasers for valuable consideration without notice protected.

By sect. 14, it is made lawful for a judge, upon the application of the judgment creditor, to order that any government stock, funds or annuities, or any stock or shares of or in any public company in England, whether incorporated or not, standing in the name of the debtor, in his own right or in the name of any person in trust for him, shall stand charged with the amount of the judgment with interest, and the creditor is to have all such remedies as he would have had if such charge had been made^q by the debtor; no proceedings, however, are to be taken to obtain the benefit of the charge until after six calendar months from the date of the order. Sect. 14, judge's order to charge stock.

The order, in the first instance, is made *ex parte*, and is an order *to show cause* only, and the effect of this order is, after notice thereof, to restrain the Governor and Company of the Bank of England, or other public company, from permitting a transfer of the stock or other property so charged, until the order is made absolute or discharged.^r

^p And by the same section the judgment creditor is given the same remedies in equity against the hereditaments so charged as if the debtor had in writing agreed to charge the same, provided that no proceedings in equity to obtain the benefit of the charge are to be taken for twelve months. Judgments are thus made *equitable estates*. See *Rolleston v. Morton*, 1 Dru. & War. 195, *per* Lord St. Leonards. It is also provided that the charge shall not give the judgment creditor any preference in case of

the bankruptcy of the debtor, unless the judgment has been entered up one year before the bankruptcy.

^q See *Kinderley v. Jervis*, 2 Jur. (N. S.) 602.

^r If the debtor be taken under a *ca. sa.* before the benefit of the charge upon any property is realized and the money applied towards payment of the judgment, the charge is forfeited (s. 16).

By s. 18, all *decrees* and *orders* in equity and *rules* of Courts of Law, and all orders of the Lord

Sect. 19.
Registration.

It is however provided, by sect. 19 of the act, that no *judgment, decree or order* of equity, or *rule*^s of a court of law, shall by virtue of that act affect any such lands or hereditaments as to *purchasers, mortgagees or creditors*, unless and until a memorandum of the name and usual place of abode, and the title, trade or profession of the debtor, and the Court and title of the cause or matter in which the judgment, decree, order or rule has been made, and the date of the judgment, decree, order or rule, and the account of the money to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster.^t

2 & 3 Vict. c. 11.

And by the 2 & 3 Vict. c. 11, s. 4, the registration is in effect required to be repeated *every five years*; that is to say, the judgment, decree, order or rule, as the case may be, will, after the expiration of five years from the registration, be void as against subsequent *purchasers, mortgagees and creditors*, unless re-registered *within five years* before^u the time of their becoming such, and the same after five years from the re-registration, and so on every succeeding five years.

Re-registration
every five
years.

Chancellor and of the Court of Review in bankruptcy, whereby any *sum of money*, or costs, charges or expenses shall be *payable to any person*, are to have the effect of *judgments* in the superior Courts of Law; and the *persons to whom the money* shall be *payable* are to be deemed to be and are to have the same remedies as *judgment creditors* under that act.

These decrees, orders and rules are not, however, placed on the same footing as judgments, beyond the similarity of the remedy upon them hereby given. *Farmer v. Mottram*, 6 Man. & G. 684; *Newton v. Boodle*, 6 C. B. 532; 18 L. J., C. P. 73.

^s See note ^r, *supra*.

^t To bind lands situated in the counties of Middlesex and Yorkshire the judgment must also be registered in the county register. 7 Ann. c. 20; see also 5 Ann. c. 18; 6 Ann. c. 35, and 8 Geo. II. c. 6. And to bind lands in the counties Palatine of Lancaster and Durham, the judgment, decree, &c. must be registered also with the prothonotary of the Palatine Court. 18 & 19 Vict. c. 15, s. 2.

^u The policy of this being that purchasers and others need not look back more than five years on the register; thus they are not to be affected by any judgment, &c. that does not appear on the register within the last five years.

And now by the 3 & 4 Vict. c. 82, s. 2, and the 18 & 19 Vict. c. 15, ss. 4 and 5, it is declared, that no such judgment, &c. shall, either by virtue of the 1 & 2 Vict. c. 110, or otherwise, affect such lands or hereditaments, as to *purchasers, mortgagees or creditors*, unless and until registered, notwithstanding the purchaser, mortgagee or creditor having *notice* thereof.^x

3 & 4 Vict. c. 82.
18 & 19 Vict.
c. 15.

It was, however, also provided by the 2 & 3 Vict. c. 11, s. 5, that such judgments, &c., *although registered*, should not affect such lands and hereditaments, as to *purchasers and mortgagees without notice*^y thereof, any further than a judgment duly docketed would have done before the 1 & 2 Vict. c. 110.^z

The above act, 3 & 4 Vict. c. 82, also declared that the charge created by the 1 & 2 Vict. c. 110, s. 14, should be taken to extend to the interest of the judgment debtor, whether in *possession, remainder or reversion*, and whether *vested or contingent*.

^x Some difficult questions have arisen upon the Registration Acts. See *Westbrook v. Blythe*, 3 El. & Bl. 737; 1 Jur. (N.S.) 84; *Watts v. Porter*, 3 El. & Bl. 743; 1 Jur. (N.S.) 133; *Hughes v. Lumley*, 4 El. & Bl. 274; 1 Jur. (N.S.) 422; *Beavan v. Lord Oxford*, 2 Jur. (N.S.) 1121.

^y Purchasers, however, cannot rely safely upon this proviso, as such trifling circumstances would be held to constitute *constructive notice*. See "*Prideaux on Judgments*," chap. 2.

^z See "*Execution, Elegit*," *infra*.

CHAPTER XIV.

PROCEEDINGS IN THE NATURE OF APPEAL.

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UPON signing final judgment the party becomes entitled to have satisfaction of the same, either by the payment of the money, the return of his goods, the delivery of possession of his lands, the performance of the duty, or the discontinuance of the wrong, as the case may be. And when such satisfaction is made, the other is entitled to an acknowledgment in writing, called a *satisfaction-piece*,^a upon the production of which the officer of the Court will enter the *satisfaction of record*.

The successful party is entitled to issue execution immediately upon signing judgment, and need not wait for or demand satisfaction.

^a See the form, Reg. Hilary Term, 1853, *infra*.

There may, however, at this stage be ground either for vacating or reversing the judgment, or for staying proceedings to execution, notwithstanding satisfaction not appearing on the record: for example, if a judgment has been obtained by fraud and imposition, the Court will at once vacate it upon motion, and in many cases will punish the offending party, as in the case of a warrant of attorney obtained by deception and fraud.

Vacating judgment on account of fraud.

If upon the expiration of the time for delivering the plea or other pleading default is made, and the opportunity is instantly seized, and judgment signed; although this is regular, it will, nevertheless, be set aside upon motion, if the defendant will show a good excuse for being behind time, and swear to a good defence upon the merits.^b So, again, if any ground of defence has arisen since the time that it could have been pleaded, as for example, a *release*, or any circumstance that would discharge the debtor, it may, at any time, be brought before the Court by motion, or by means of the writ of *auditâ querelâ*, which is an original writ issuing out of Chancery, and directing the Court to call the parties before them, and to do justice between them;^c this writ can only issue, however, with leave of the Court, and is now, in all ordinary cases, superseded by the motion.

Setting aside judgment,

upon motion, or *auditâ querelâ*.

Lastly, there may be reasons for reversing the judgment, as being erroneous in point of law, either on the face of the record, or on account of some error in the proceedings not apparent on the record. The first is technically called *error in law*, the latter, *error in fact*. Or, thirdly, there may be error in the process arising from the default of an officer of the Court. For example, where upon judgment for the plaintiff it appears that the declaration discloses no cause of action, there is *error in law* in the judgment; secondly, if it turns

Reversing judgment for error.

Error in law, and in fact.

^b As to the application of the defendant to be let in to defend after judgment by default, see p.

201, *supra*.

^c See Com. Dig. *Auditâ Querelâ*, and 1 Exch. 59, 701; 4 Exch. 82.

out that a woman plaintiff who sued, as a *feme sole*, was, in fact, a *feme covert*,^d or that an infant plaintiff has sued by attorney instead of guardian, or if judgment is signed after the death of one of the parties, and more than two terms after verdict,^e there is *error in fact* in the judgment and proceedings.

Error in law to
higher Court.

Where there is error in law, it is considered in theory to have been the mistake of the Court, for the following reasons: the error appears on the face of the record, and the Courts are supposed, as indeed in ancient times was the practice, in all cases to give judgment after an inspection and consideration of the whole record.^f Proceedings to reverse a judgment for error in law are, therefore, always taken before a higher Court, namely, in the first instance, before the Court of Exchequer Chamber, from which, again, there is an appeal to the House of Lords.

Error in fact to
same Court.

In the case of error in fact, or in the process, the same reason does not apply, and proceedings to reverse the judgment for such errors are always taken before the Court in which the judgment has been given.

Formerly, proceedings in error were taken by suing out a *writ of error*, an original writ proceeding from the Sovereign to the Court, directing them in the one case to send the record to a higher Court to be reviewed, and in the other, to consider the error in fact. From the words of the latter writ, proceeding upon error in fact was called, in the Queen's Bench, proceeding *coram nobis*, that is, before the Queen herself, and in the other Courts, *coram vobis*.^g

Error coram
nobis,
and coram
vobis.

The party taking proceedings in error, is the *plaintiff*

^d *Haward v. Williams*, Style, 254, 280.

^e 2 Wms. Saund. 72 k.

^f At the present day this is true in practice, only when an issue in law has been raised, or the record has been brought be-

fore the Court upon motion, either in *arrest of judgment* or for judgment *non obstante veredicto* or otherwise.

^g As to the cases for which error may be brought generally, see 2 Wms. Saund. 100.

in error, without regard to the position he may have occupied in the original proceedings.

The modern proceedings in error are very simple.^b The party alleging error deposits a memorandum with the officer of the Court in which the judgment has been given, stating that there is error in fact, or in law, in the record and proceedings.

Proceedings generally.
Memorandum of error.

In the case of error in fact, he must also deposit an affidavit of the matter constituting the error. The memorandum is filed by the officer, and he will give the party a note of the receipt thereof, a copy of which, accompanied in the case of error in fact by a copy of the affidavit, and in the case of error of law by a statement of the ground of error to be argued, is then to be served upon the other side, now the defendant in error.

The proceeding for error in fact, or in the process, prevents the issuing of execution without the leave of the Court,ⁱ and in the case of error in law, it is a *supersedeas* of execution until the time of, and default in putting in bail, or an affirmance of the judgment or other disposal of the proceedings, without a reversal of the judgment. The Court will, however, order execution to issue if the ground of error is frivolous. And the Court of Error will also quash the proceedings in error for the same cause, or if error has been brought contrary to good faith, as where the plaintiff in error has agreed not to bring error.

How far a supersedeas of execution.

No judgment can be reversed or avoided for error, unless error is commenced or brought and prosecuted with effect within *six years* after judgment signed, unless the party entitled to bring error is *under twenty-one, feme covert, non compos mentis, or beyond the seas*, in

Period for bringing error.

^b See Common Law Procedure Act, 1852, ss. 146—167; Reg. Hilary Term, 1853, 64—69, *infra*.

ⁱ It is not of itself a supersedeas

of execution. *Birch v. Triste*, 8 East, 412; *Knight v. Thynne*, 9 Dowl. 984.

which case such party has six years from the removal of the disability; or if the intended defendant in error is beyond the seas when judgment is signed, the party entitled to bring error has six years from his return.

Proceeding in error in fact.

Upon proceeding in error in fact, the plaintiff in error must, within eight days of the filing of the above memorandum, *assign error*. This is analogous to declaring in the action, and the assignment of error is delivered to the defendant, who must plead to it in the ordinary way, and issue is joined either in fact or upon demurrer and determined in the ordinary way, whereupon judgment will be given by the Court accordingly.

Proceeding in error in law, in what cases.

Error in law can be brought only where the error appears on the face of the record, with one exception, namely, by the Statute of Westminster the second, c. 31, either party objecting to the ruling of the judge at the trial may tender a *bill of exceptions*^k thereto and require the judge to seal it, and may bring this before a Court of Error, in connection with the record of the judgment.

Bill of exceptions.

Bail.

Upon proceeding in error in law,^l it may be observed, in the first place, that when the *defendant*^m proceeds in error, execution is not stayed, except by the special order of a judge, unless the defendant, with two sureties, within *four clear days* after lodging the memorandum of error, or after signing judgment, or before execution executed, becomes bound by *recognizance*ⁿ to the other side in double the sum adjudged, to prosecute the proceedings in error with effect, and to pay all sums of money adjudged, with costs, and also damages for delay of execution.^m

Suggestion.

The plaintiff in error in law must, within ten days of the time of filing the memorandum, make up the judg-

^k See "Bill of Exceptions," p. 163, *supra*.

^l See n. ¹, *supra*.

^m Common Law Procedure Act, 1852, s. 151; and *James v. Coch-*

rane, 9 Exch. 552.

ⁿ As to the nature of a recognizance, and as to notice of and exceptions to bail, see chapter on "Arrest on Mesne Process," *infra*.

ment roll and enter a suggestion of error thereon to the following effect:—

The seventh day of November, 1855.

The plaintiff [or the defendant] says there is error in the above record, and the defendant [or the plaintiff] says there is no error therein.

And after the entry of the suggestion,^o either party may enter the cause for argument, and may give the other party notice thereof and proceed to the argument thereof as on demurrer; the parties must also, between them,^p furnish the Court with copies of the record upon which the error is alleged, and the officer of the Court below will bring up the original into the Exchequer Chamber on the day appointed for the argument.

If, however, the defendant wishes to plead to the error, he may, after the service of the *receipt note*, give four days' notice to the plaintiff in error to *assign* error, instead of entering the suggestion. The assignment, as before observed, is in the nature of a declaration, and it must be conformable to the note and statement of error delivered.^q

Assignment of error.

^o As to the suggestion in case of death or marriage of parties, see Common Law Procedure Act, 1852, ss. 161—167; Chit. Forms, "Error."

^p R. H. T. 1853, r. 86, *infra*.

^q The following assignment of error from the Queen's Bench will serve as an example:—

In the Exchequer Chamber.

The South-Eastern Railway Company } *Afterwards,*
v. *Charles Cochrane.* } *to wit, on the*
[day of depo-
siting memo-
randum of error], *in the Court of*
Exchequer Chamber of our lady the
Queen, before the justices of the
Common Bench and the barons of
the Exchequer of our said lady the

Queen, come the said South-Eastern Railway Company by Edward Maynard their attorney, and say, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, that the declaration aforesaid is bad in substance, and the matters disclosed therein insufficient in law for the said Charles Cochrane to maintain his aforesaid action against the said South-Eastern Railway Company, and therefore the said plaintiffs in error pray that the judgment aforesaid for the error aforesaid, and for other errors in the said record and proceedings, may be reversed, and that they may be restored to all things which they have lost by occasion of the said judgment.

Pleadings.

After the assignment of error, the defendant must, within eight days, plead either a release of error, a bar by time or other defence, as the case may be. The plaintiff then replies and the pleadings go on as in ordinary cases to issue, either in fact or on demurrer, and this is decided in the ordinary way, except that either party may, in the first instance, take the case to trial or put it down for argument.

As in the action, the plaintiff in error may discontinue the proceedings, or the defendant may confess the error, and if the plaintiff fails at any stage to proceed according to the course of practice, the defendant may sign judgment of *non pros*.

Judgment of Court of Error.

After the decision of the issues, the Court of Error delivers such judgment and awards such process as in their opinion the Court below ought to have done, and they may award a *repleader*, a *new trial*, or a *trial de novo*, if necessary.

Restitution.

If execution has already issued and the judgment is reversed, the plaintiff in error may sue out a writ of *restitution*, which directs the sheriff to restore to him what was taken upon the original judgment. The more usual course, however, is to apply for a rule, ordering restitution to be made.

Error to House of Lords.

Either party dissatisfied with the judgment of the Court of Exchequer Chamber may appeal in error to the Court of the Queen, before the Lords in Parliament assembled.

The appeal must be brought within six years of the judgment of the Exchequer Chamber.

Proceedings.

The party proceeding deposits a *note of error*, similar to that before mentioned, with the Masters of the Court in which the action is pending, and requiring them to take the judgment roll on a stated day to the bar of the House of Lords.

The proceedings^r are similar in principle to those in

^r See Macqueen's Practice of Standing Orders, 100—138, 1856. House of Lords; also the Lords'

the Exchequer Chamber, except that upon the plaintiff failing to proceed, the defendant must apply by petition to the House to enter a *non pros*.

Upon the judgment of the House of Lords, the record is remitted to the original Court and the final judgment entered thereon. Judgment.

Although no proceedings in error in law can be taken, except for error upon the record, there are certain cases in which an appeal lies to the Exchequer Chamber and House of Lords from the decision of the Courts upon motion. Appeal from decision of Court on motion.

Thus, in all cases of rules to enter a verdict or a nonsuit, upon a point reserved at the trial, if the rule *nisi* be refused, or granted and then discharged or made absolute, the party decided against may appeal.^s Motions to enter a verdict or nonsuit.

So, again, in all cases of motions for a new trial, upon the ground that the judge has not ruled according to law, the party decided against may appeal, provided one of the judges dissent from the decision of the Court, or the Court think fit that an appeal should be allowed; no appeal is, however, to be allowed where the application for the new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of the evidence.^t Motion for a new trial.

Notice of appeal^u must be given to the opposite party and to one of the Masters of the Court, within four days after the decision. Bail^w must also be put in to make the appeal a stay of execution. Notice.
Bail.

The appeal is upon a case stated by the parties, to be settled in case of difference by the Court or a judge, and in the case, is stated so much of the pleadings, evidence, and the ruling or judgment objected to as may be necessary to raise the question for the Court of Appeal. Proceedings by special case.

Lastly, it may be observed that there is, in general, Appeal from judge at chambers.

^s Common Law Procedure Act, 1854, s. 34.

^u *Ibid.* s. 37.

^w *Ibid.* s. 38.

^t *Ibid.* s. 35.

an appeal from the decision^x of a judge sitting at chambers or elsewhere, by motion to the Court on affidavit, setting out the order of the judge with the facts. When, however, the matter is left by statute entirely to the judge's discretion, or where the matter does not refer to the practice of the Court, and jurisdiction is given only to the judge, there is no appeal, as, for example, where the judge makes an order under the 1 & 2 Vict. c. 110, s. 14, charging stock;^y or where a judge certifies after the trial, that in his opinion distinct causes of action were not intended to have been set up under certain distinct counts.^z

^x 12 M. & W. 5; 2 Dowl. N. S. W. 42; see p. 209, *supra*.
467, 562.

^z Reg. Trinity Term, 1853, r. 3,

^y *Graham v. Connell*, 1 L. M. & *infra*.
P. 438; *Brown v. Bamford*, 9 M. &

CHAPTER XV.

EXECUTION.

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FINAL process or execution is that by which the successful party enforces satisfaction of the judgment. It is a judicial writ issuing out of the Court in which the record is upon which it is founded. Execution generally.

The writ is directed in general to the sheriff,^a who is To whom directed.

^a Writs of execution may issue into any counties at the choice of the execution creditor. Common Law Procedure Act, 1852, s. 121.

primarily the proper officer of the Court for that purpose. If he is interested in the suit, it is directed to the coroners, and if they are interested, it is directed to special officers of the Court appointed for the purpose, called *elizors*.^b It commands the person to whom it is directed to levy the money upon the goods or lands of the debtor, or to deliver the debtor's goods and lands to the creditor, or to take the body of the debtor, or to cause the possession of the plaintiff's goods or lands to be delivered to him, or as the case may be; and to make his *return* to the writ, stating how he has executed it.

Mandatory
part and in-
dorsement.

The writ must be authorized by and conformable to the judgment. It consists in general of two parts, the *mandatory* part or body, and the indorsement; the former must strictly pursue the record upon which it is founded, but the indorsement, where the judgment is for money, must state the actual amount of money for which the plaintiff is entitled to issue execution, which will not necessarily be the same as that for which judgment has been signed; for example, where the debtor has paid a portion of the money, or where judgment is signed on a warrant of attorney for a large sum, to secure the payment of a smaller, the latter only can be levied.^c

The executions in ordinary use are the ordinary *fi. fa.*, the *elegit*, the *capias ad satisfaciendum*, the *habere facias possessionem*, the *retorno habendo*, the *capias in withernam* and the execution for the *delivery of specific* chattels, and lastly, with the subject of execution, may also be classed the writs of *mandamus* and *injunction*. The *fi. fa.*, *elegit* and *ca. sa.* may all issue at once in all cases where money is to be recovered, though when either the *elegit* or *ca. sa.* is executed, no other can in general be executed, nor after the *fi. fa.* is executed can another be executed, till this writ is returned,^d when the others

^b Co. Litt. 158 a; *Mayor of Norwich v. Gill*, 8 Bing. 27.

^c *Johnson v. Harris*, 15 C. B. 357.

^d To this there is one excep-

tion, namely, where the goods are insufficient to pay the year's rent in arrear. 2 D. 762.

may be executed for so much as was left unsatisfied by the *fi. fa.*

Execution may be issued immediately *final judgment*^e When issued. is completely signed, and it must be issued within six years, otherwise the execution cannot issue without a *revival* of the judgment.^f

As judgment may be signed at any time of the year, whether in term or vacation, so, also, execution may issue,^g and the writ is dated of the day when actually sued out, and does not, as formerly, relate back to the term; and it is, in general, made returnable when executed, although it *may* be made returnable on a day certain, and in some cases it always is so, as in the case of a *ca. sa.* issued in order to *fix bail*.^h

The writ is in force for twelve calendar months from its date; it may, however, at any time before its expiration be renewed for another twelve months from the date of renewal, and so on from time to time it may be kept in force until it is executed.ⁱ Renewal of writ.

The writ being deposited with the undersheriff or his London agent, the sheriff is bound to execute it without unreasonable delay, otherwise he will be liable to an action,^k and either he or his undersheriff may execute it, or he may by his warrant authorize his own bailiff,^l or a special bailiff selected by the party issuing execution, to execute it for him. Execution of writ.

The writ must be executed by the person named in the warrant; he need not, however, actually perform all

^e See "Signing Judgment," p. 198, *supra*.

^f See "Revival of Judgment," p. 226, *infra*.

^g See as to issuing writs generally, p. 79, *supra*, and Reg. Hilary Term, 1853, 70—77, *infra*.

^h See "Arrest on Mesne Process," "Bail," *infra*.

ⁱ See Common Law Procedure Act, 1852, ss. 124, 125.

^k *Clifton v. Hooper*, 6 Q. B. 468.

^l If the writ is to be executed within a *liberty* or *franchise*, and does not contain the *non omittas* clause, the sheriff should issue a warrant to the bailiff of the franchise to execute it; should he execute in any other way, he will be liable to an action at the suit of the lord of the franchise.

the acts himself. If he is engaged in the execution, it will, in general, be sufficient. It can only be executed in the county into which it is sent; nor can it be executed in the Queen's presence, nor in any of the Superior Courts whilst sitting. It may be executed at any time of the day or night, and upon any day except Sunday. It cannot be executed, however, after it is countermanded^m by the party issuing execution.

In order to execute it, the officer may enter the house of the judgment debtor, if he can do so peaceably and without breaking in; he may, however, enter through the window or other aperture, or by artifice, and may open the door if merely latched. He may also enter the house of a stranger if the debtor has either removed his goods there to avoid execution or taken refuge there himself; the sheriff, however, must be certain of the fact, he will not be justified if the event prove that he was mistaken, for he cannot enter a stranger's house on suspicion.ⁿ

Semayne's case.

Every man's
house his
castle.

It is an ancient and fundamental principle of law, that the sheriff shall not break into the debtor's dwelling house in order to execute civil process, the ancient maxim being, that *every man's house is his castle*;^o a man's house is, however, only thus held sacred for the protection of himself and his household; if any stranger take refuge there or remove his goods there to avoid execution, the officer, after a demand of entry and refusal, may break in. The above privilege extends only to outer doors and fastenings; the sheriff once peaceably in, may break any locks or other fastenings to complete his execution, or if forcibly turned out, he may break even the outer door to get in again.

To the general rule there are a few exceptions; thus,

^m *Hunt v. Hooper*, 12 M. & W. 664.

ⁿ *Cook v. Birt*, 5 Taunt. 765.

^o See *Semayne's case*, 5 Rep. 91, and 1 Smith's Lead. Cas., and notes.

the sheriff may break in to execute a writ of *habere facias possessionem*, or to execute process at the suit of the Crown, or where the debtor having been arrested escapes and the sheriff makes *fresh pursuit*.^p

As soon as the writ is returnable, which in general it is when executed and not before, either party may obtain a rule as of course, calling upon the sheriff to return the writ; disobedience to which will be punished by attachment; and a *false return* will render him liable to an action; there are, however, some cases in which the sheriff cannot be ruled to return the writ, namely, where it has been executed by a special bailiff, or where the execution has been compromised, or where there has been collusion between the creditor and the sheriff's officer, and other cases of a like nature.

At common law the sheriff was entitled to no remuneration for the expense of executing the writ. But by several statutes he has been authorized, upon executing a writ of execution against *goods or lands*, to take in addition to the sum of money to be levied, certain *poundage*^q or percentage, and also certain fees;^r he has no right to poundage upon executing a *ca. sa.*, but to such fees only as may be allowed by the Courts.^s The sheriff is not entitled to poundage or fees unless there is an actual levy. If the execution is countermanded after levy, and before sale, the party issuing execution is liable for the expenses,^t but he may, in all cases, levy the poundage, and fees of execution^u in addition to the amount to be recovered.

It will be remembered that execution may issue upon *decrees and orders* in Equity and *rules* of Courts of Law,^v directing the payment of money, costs or expenses; in

^p See *Semayne's case*, *supra*.

^q 2 Inst. 210; 29 Eliz. c. 4; 3 Geo. I. c. 15, s. 16. See *Holmes v. Sparkes*, 12 C. B. 242.

^r 7 Will. IV. & 1 Vict. c. 55, ss. 2, 3, 4.

^s 5 & 6 Vict. c. 98, s. 31; see

Lush. Prac. 834.

^t *Rawstorne v. Wilkinson*, 4 M. & S. 256; *Tyson v. Paske*, 2 Ld. Raym. 1212.

^u 43 Geo. III. c. 46, s. 5; Common Law Procedure Act, 1852, s. 123.

^v See note ^r, p. 209, *supra*.

certain of these cases, however, execution cannot be had without a second rule of Court, which will be a rule *nisi* in the first instance, calling upon the party to show cause why execution should not issue; this is so in the case of an award, or a judge's order obtained *ex parte*, being made a rule of Court.^x

Scire facias,
Revivor and
Suggestion.

The writ of execution, as before observed, cannot issue after the expiration of six years from the date of the judgment, unless the latter is revived; the writ must also, in general, strictly pursue the record, so that if it is intended to issue execution against any person not actually appearing on the record, but who is liable to execution, such person must, in general,^y be made a party to the record by means of the writ of *scire facias*, or the writ of *revivor*, or by a *suggestion* on the roll, as hereinafter mentioned.

Sci. fa.

The *scire facias*^z is a writ founded upon some matter of record, and it requires the party against whom it issues, to show cause why the party issuing it should not have the benefit of the record in a certain manner, or why the record should not be annulled, or as the case may be. In certain cases it is an *original writ*^a returnable in Chancery, as where it is issued to annul letters patent; but when it is founded upon a record of one of the Superior Courts of Law, it is a judicial writ returnable in such Court.^b In former times, strangers

^x *Rickards v. Paterson*, 1 Dowl. N. S. 52; *Jones v. Williams*, 11 A. & E. 175.

^y Where, however, it is expressly provided by statute that execution may issue without any suggestion or *scire facias*, this will of course form an exception. Such an exception was made by the 7 & 8 Vict. c. 110, s. 68, in the case of execution against individual shareholders of companies registered under that act. This act is however now repealed by the 19 & 20 Vict. c. 47, s. 107.

^z 2 Wms. Saund. 71, note 4.

^a See p. 9.

^b By the Common Law Procedure Act, 1852, s. 132, it is enacted, that writs of *scire facias* out of the superior Courts of Law against bail on their recognizance; *ad audiendum errores*; against members of a joint-stock company or other body upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; by or against a husband to

to the record were always made parties thereto by means of this writ; at present, however, wherever it becomes necessary to revive a judgment by reason of lapse of time or a change by death or otherwise of the parties entitled to or liable to execution, the party alleging himself entitled may either sue out a *writ of revivor*, as presently mentioned, or apply to the Court or a judge for a rule or order to enter a *suggestion* on the roll, that it manifestly appears to the Court that such party is entitled to execution.

The writ of revivor is a judicial writ directed to the party, and calls upon him to appear and show cause why execution should not issue against him. It is sued out and served in the same manner as the writ of summons. It cannot be sued out at all after the expiration of twenty years from the date of the judgment, nor after ten years without a rule of the Court or a judge's order, nor after fifteen without a rule to show cause.^c Upon the service of the writ, the defendant appears thereto by delivering a notice to the plaintiff's attorney to the effect that he appears, whereupon the parties proceed to the pleadings and other proceedings as in a regular action.

The proceeding by suggestion is still more simple; the party claiming to be entitled to execution takes out

have execution upon judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment under the 8 & 9 Will. III. c. 11; for the recovery of land taken under an *elegit*; shall be tested, directed and proceeded upon in like manner as *writs of revivor*.

^c The form of the writ is as follows:—

Victoria, &c., to John Williams of
—, *greeting:*

We command you that within eight

days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Common Pleas to show cause why Samuel Cox, as the executor of the last will and testament of Henry Williams, deceased, should not have execution against you of a judgment whereby the said Henry Williams, on the seventh day of May, 1856, in the said Court recovered against you 100l.: And take notice, that in default of your so doing, the said Samuel Cox may proceed to execution.

Witness, &c.

a summons at judges' chambers or moves the Court for a rule *nisi*, calling upon the party against whom the proceeding is taken, to show cause why the suggestion should not be entered; the latter will then have an opportunity of opposing it, and if it appears clear to the Court or judge that execution ought to issue, a rule or order will be made for the entry of the suggestion, whereupon execution may at once issue. If, however, there is any doubt about it, the Court will leave the party to proceed by *revivor* or *scire facias*, and will not try the disputed points upon affidavit.

Fi. fa. The writ of *fi. fa.* commands the sheriff to make of the *goods* and *chattels* of the debtor the amount therein stated,^d and to have the same in Court to be rendered to the judgment creditor.

What may be taken. Every thing of a chattel nature,^e belonging to the debtor, may be seized, including^f *money, bank notes, cheques, bills, notes, bonds* and *other securities* for money,

As to fixtures. also *leaseholds* in his possession and *tenants' fixtures* thereon, but when the debtor's estate is freehold, the fixtures cannot be taken; only those goods in which the debtor has an *actual property* can be sold, and if his property is short of the absolute property in them, such limited interest only can be sold.

Joint property. Where the debtor is *joint owner* with another, the property may be seized, but the interest of the other joint owner cannot be interfered with; a purchaser from the sheriff will become tenant in common of the property, and take the same interest as the debtor had.^g

The sheriff must ascertain at his peril that the goods he is about to sell are the property of the debtor, and

^d The creditor may include in this the poundage and expenses of the execution. See p. 225, *supra*.

^e *Scott v. Scholey*, 8 East, 483.

^f 1 & 2 Vict. c. 110, s. 12.

^g Much difficulty arises occasionally in the case of an execu-

tion upon partnership property, the interest of the execution debtor being subject to the state of the partnership account. *Garbett v. Veale*, 5 Q. B. 414; *Dutton v. Morison*, 17 Ves. 193; *Chapman v. Coops*, 3 B. & P. 289.

for this purpose he may impanel a jury to try the fact.^h

By the stat. 8 Ann. c. 14, s. 1, the sheriff has no rightⁱ to remove goods lying upon lands or premises leased for lives, years or otherwise, unless the *party issuing execution* pays all arrears of rent not exceeding one year's rent^j to the landlord^k or his bailiff.

Protection to
landlord, 8
Ann. c. 14.

So, also, for the promotion of good husbandry, certain *farm crops*, in certain cases, can only be sold, subject to conditions as to using and consuming the same upon the land.^l

Farming stock,
86 Geo. III.
cc. 50, 56.

In all other cases everything may be taken without reservation, except things in *actual use* at the time;^m and except bedding, wearing apparel, and implements of trade, not exceeding, in the whole, 5*l.* in value.ⁿ The only question will be, are they the property of the debtor. It may be here observed, also, that by 13 Eliz. c. 5, all feigned and *fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions*, devised with the intent to delay creditors, are utterly void as against such creditors and persons claiming under them.

Fraudulent
conveyances,
13 Eliz. c. 5.

As a general rule, by virtue of sect. 16 of the Statute of Frauds, the writ binds the property of the debtor from the time of delivery thereof to the sheriff to be executed.

From what
time writ binds,
29 Car. II. c. 3,
s. 16.

But by the 19 & 20 Vict. c. 97, no writ of execution, nor

19 & 20 Vict.
c. 97.

^h In the case of adverse claimants, he may avail himself of the provisions of the Interpleader Act. See p. 31.

ⁱ If, however, the sheriff does remove them, the execution is not void, though the sheriff is liable to an action; *Wharton v. Naylor*, 12 Q. B. 673; nor is the sheriff liable if he did not know that rent was in arrear, 3 B. & A. 440; nor in any case if the goods are not actually removed, 13 C. B. 304.

^j The landlord can only claim four weeks' rent when premises

are let at a weekly rent; 7 & 8 Vict. c. 96, s. 67. And see 19 & 20 Vict. c. 108, s. 75, as to claim of landlord when there is execution on a warrant of the County Court.

^k As to which landlord where there are sub-leases, see *Bennet's case*, 2 Str. 787, where it is said only to apply to the *immediate* landlord of the judgment debtor.

^l See 56 Geo. III. cc. 50, 56; also 14 & 15 Vict. c. 25, s. 2.

^m See 3 M. & W. 248, 254.

ⁿ 8 & 9 Vict. c. 127, s. 8.

any attachment against goods is to prejudice the title of any *bonâ fide* purchaser for valuable consideration, acquired before *actual seizure*, provided that at the time of acquiring such title he had not notice that such writ, or any writ under which the goods might have been seized, had been delivered to the sheriff.

Bankruptcy of
debtor, 12 & 13
Vict. c. 106.

If a trader within the bankrupt laws commits an act of bankruptcy, and a petition for adjudication of bankruptcy is filed, and assignees of the bankrupt's estate appointed, all the property to which the bankrupt is beneficially entitled vests in the assignees, their right and title relating back to the date of the act of bankruptcy.

Formerly, the vesting of the property in the assignees had the effect, by the operation of this relation of the title of the assignees to the act of bankruptcy, of entirely invalidating all executions levied subsequently to the act of bankruptcy; however, after several protecting statutes in favour of *bonâ fide* execution-creditors, it was enacted by the 133rd section of the Bankrupt Law Consolidation Act, 1849,ⁿ that all executions and attachments *bonâ fide* executed by *seizure* and *sale* before the date of the filing of the petition for adjudication of bankruptcy should be valid, notwithstanding any previous act of bankruptcy, provided the execution-creditor had not before such sale notice of any prior act of bankruptcy.

Execution of
writ.

The officer intrusted with the execution enters the premises of the debtor and takes possession of so much of his goods and chattels and money or securities as will be sufficient to make the amount to be levied; the goods and chattels he proceeds to sell with reasonable despatch by employing an auctioneer to take an inventory and sell them on the premises if the debtor permits it, or elsewhere. The seizure gives the sheriff a right to sell the goods, but the property of the debtor therein is not divested until the sale.^o

Writ of ven-
ditione expo-
nas.

If he cannot get a reasonable price for the goods, he

ⁿ 12 & 13 Vict. c. 106.

^o 11 A. & E. 866.

should not sell them but *return* that he has taken the goods and has not sold them, upon which the judgment creditor may issue a writ of *venditioni exponas*, upon which the sheriff must sell for what he can get; if he should disobey the writ, a *distringas* may issue to the coroner against the goods of the sheriff to compel him. Money taken in execution is delivered to the creditor, and bills, notes and other securities may be sued upon in the sheriff's name, upon the creditor giving the sheriff security for the costs of the action.

Venditioni
Exponas.

If the sheriff return that the debtor is a beneficed clergyman, and has no lay property, a writ of *feri facias de bonis ecclesiasticis* issues to the bishop, who will thereupon levy the amount in the same manner as the sheriff; or the creditor may have a *levari* or *sequestrari facias*, upon which the bishop will appoint a sequestrator^p to make the amount out of the goods and the profits of the ecclesiastical property of the parson.

Fi. fa. de bonis
ecclesias.

Sequestrari fa.

The *levari facias*, which commands the sheriff to make the amount out of the rents and profits of the land of the debtor, is now almost superseded by the *elegit*.

Levari facias.

By the *elegit*^q the creditor acquires the *possession* of the goods and lands of the debtor. It acquired this name from the words of the writ expressing the exercise by the creditor of the choice given to him by the Statute of Westminster the Second, c. 18, upon which the writ was founded. At common law the creditor could only have a *fi. fa.*, under which the goods and chattels were sold, or *le. fa.*, under which the profits of the land were given to him; but by the above statute it was enacted, that it should be in his election to have a *fi. fa.*, or to have delivered to him the *chattels* of the debtor (saving the oxen and beasts of the plough) and *one-half* of his land until the debt should be levied. The process framed to effect this execution for the creditor contained

Elegit.

13 Edw. I. st. 1,
c. 18.

^p See 1 & 2 Vict. c. 110, s. 55.

^q 2 Wms. Saund. 67 b, note 1.

this recital, *quod elegit sibi, executionem fieri de omnibus catallis, et medietatem terræ*, whence the name *elegit*.

1 & 2 Vict.
c. 110, s. 11.

At the present day, by the 1 & 2 Vict. c. 110, s. 11, it is enacted, that upon the *elegit*^a the sheriff shall deliver to the party suing *all* such lands, tenements, rectories, tithes, rents and hereditaments, including those of copyhold and customary tenure, as the person against whom the writ is sued or any person in trust for him is seised or possessed of at the date of the judgment or afterwards, or over which such person has a disposing power for his own benefit.^r

Extending the
land.

In executing the *elegit* the sheriff empanels a jury to assess the value of the goods and chattels and also the value of the lands, and the debtor's interest therein. The sheriff then returns the writ with the inquisition of the jury into Court, and also delivers the *legal* possession of the lands to the creditor, subject to the interest of third parties therein, leaving him to take *actual* possession by virtue of his title as *tenant by elegit*, which is complete upon the return of the writ into Court; if possession is refused him by the debtor he may then maintain ejectment against him.^s

Estate of tenant by *elegit*.

The estate of the tenant by *elegit* is a *quasi freehold*, being, however, but a *chattel*^t interest, passing to his executors or administrators. If the debtor have demised the lands, reserving to himself a rent, the tenant by *elegit*, being now the *reversioner*, has a right to distrain.^u

By section 13 of the above act, judgments are made

^a An *elegit* may, equally with any other execution, issue upon *decrees, orders* and *rules* for the payment of money. See n. ^r, p. 209, *supra*.

^r As to the registration of judgments required in order to make them a charge as against purchasers and creditors, see p. 210,

supra.

^s 2 Wms. Saund. 69 f.

^t Co. Litt. 42 a; 2 Inst. 396.

^u 1 Roll. Abr. 893, B 5; *Lloyd v. Davies*, 2 Exch. 103. See also the notes to *Moss v. Gallimore*, 1 Smith's Lead. Cas., as to the right of mortgagees to distrain.

a charge^x upon interests in land, not only where the possession may be had by *elegit*, but also in others, where from the nature of the interest it cannot be delivered upon an *elegit*.

The writ of *ca. sa.* commands the sheriff to take the body of the debtor and *have him in Court*,^y to satisfy the creditor of his judgment, and it is returnable in general when executed.^z This writ issued at common law only in actions of *trespass*, but it was afterwards issued in all actions to which the *capias ad respondendum* was extended, namely, *debt*, *detinue* and all *actions on the case*, including *assumpsit* and *trover*, and it may be said, generally, that the *ca. sa.* will issue in all actions to which the *capias ad respondendum* extends.^a

By the 7 & 8 Vict. c. 96, s. 57, in all actions for the recovery of a *debt*^b no *ca. sa.* can issue, unless the amount^c recovered by the judgment exceeds 20*l.* exclusive of costs;^d by sect. 59, however, certain cases in which defendants are shown to have been guilty of fraud, or have obtained credit by deception, are excepted.

The execution of the writ is by the *arrest*^e or physical taking of the body of the debtor; the slightest touch, if accompanied with a statement that it is an arrest, is sufficient; nor, indeed, is it absolutely necessary that the officer should touch the person: he may lock him in a room,^f declaring that he makes him his prisoner; or

^x See p. 208, *supra*.

^y It does not authorize the sheriff to receive the debt.

^z But when issued for the purpose of proceeding to *outlawry*, it must be made returnable on a *day certain in term*. Reg. Hilary Term, 1853, 74, *infra*.

^a See "Arrest on Mesne Process," *infra*; and also what persons are privileged or exempted from arrest.

^b See *Fitz-ball v. Brook*, 6 Q. B. 873.

^c That is, the sum to which the plaintiff is *actually* entitled, and not the mere nominal amount of the judgment, where these differ. *Johnson v. Harris*, 24 L. J., C. P. 40; 15 C. B. 357.

^d This enactment does not extend to a *judgment for a defendant*. 5 D. & L. 762; 5 C. B. 749.

^e As to where and when the execution may take place, see "Execution in General," p. 224, *supra*.

^f *Williams v. Jones*, 2 N. R. 212, n. a.

if the debtor upon the officer saying "I arrest you," acquiesce in considering himself his prisoner, it will be sufficient.^g

The first capture of the prisoner must not be by any illegal contrivance, otherwise the arrest will be void as well as all subsequent detainers. For example, if he is captured by one not authorized to arrest him, and detained until the officer with the warrant comes up.

Charging in execution.

When arrested on final process the debtor may at once be removed to the sheriff's prison, and he will then be in custody upon all the writs that have been delivered to the sheriff; he may also be *charged in execution* by the delivery of subsequent *ca. sas.* to the sheriff. The prisoner may also be removed by means of *habeas corpus* to the prison of the Court,^h when he may be charged in execution by a judge's order.ⁱ

Rescue and escape.

After the arrest the sheriff is bound to keep the prisoner in safe custody, and for this purpose he ought to be provided with sufficient force to prevent an escape or rescue; he must not let him out of his lawful custody for a moment, or he will be liable to an action on the case^k for an *escape*.^l The escape is either *negligent* or *voluntary*; the former is where it is against the will of the officer, the latter with his consent; after a negligent escape the officer may recapture the debtor upon the same writ, and in any county and at any time, and he will not be liable to an action if he recaptures him before an action is commenced; after a voluntary escape, however, he cannot retake him.^l

^g 1 Salk. 79, n. ^a; 4 Bing. N. C. 212.

^h 5 & 6 Vict. c. 22; 11 & 12 Vict. c. 7; 17 & 18 Vict. c. 115.

ⁱ Common Law Procedure Act, 1852, s. 127.

^k By Statute of Westminster 2, the sheriff was liable for the whole debt and costs; but now by 5 & 6

Vict. c. 98, s. 31, he is liable only to damages for the actual loss sustained.

^l Where the sheriff makes *fresh pursuit* and recaptures without losing sight of him, it is no escape. Upon "Escape," see 1 Wms. Saund. 35, n. 1.

When the debtor is arrested, no other writ can, in general, issue. The mere arrest, however, does not satisfy the judgment, and execution may afterwards issue against a joint debtor; and if the debtor taken on a *ca. sa. escape*, the creditor, in addition to his remedy against the sheriff, may issue a fresh *ca. sa.* or other execution.^m So, also, if the debtor is discharged on account of his privilege, the creditor may again take him when the privilege is past, or he may issue any other execution.

Ca. sa., how far satisfaction of judgment.

If, however, the prisoner be discharged upon the authority of the creditor, the debt is discharged, and all obligations in respect of it released.

If the debtor evades execution the judgment creditor may proceed to outlaw him. First, he sues out a *ca. sa.* returnable on a day certain in term time, and if by the return day the sheriff cannot take the debtor, he returns the writ *non est inventus*. Upon this return the execution creditor takes proceedings in outlawryⁿ as follows: he sues out of the Court a writ of *exigent* or *exigi facias* to the sheriff, by which he is commanded to cause the debtor to be publicly demanded from County Court to County Court^o until, according to the law and custom of England, he be outlawed if he do not appear, and to take his body if he do appear.

Outlawry. The exigent.

Upon this writ the sheriff must call the debtor at five successive County Courts, upon which if he does not give himself up he will be *outlawed*, or if a feme, *waived*,^p as a punishment for his wilful evasion of the process of the law.

By the outlawry or waiver the debtor is put out of the protection of and disabled from availing himself of the process of the law. And his property is forfeited to the Crown.

Effect of outlawry.

^m 8 & 9 Will. III. c. 27, s. 7.

“from hustings to hustings.”

ⁿ Com. Dig. Utlagary, B.

^p Co. Litt. 128 a; 2 L. M. & P.

^o Or, in London and Middlesex, 444.

Allocatur
exigent.

If the *exigi facias* is returnable before the debtor can be called at five Courts, an *allocatur exigent* may be sued out immediately upon the return of the former, upon which the debtor may be called the remaining times.^q

Upon the completion of the five exactions, and the nonappearance of the debtor, he is *by the judgment of the coroners of the county, according to the law and custom of England, outlawed*; and this is the return made to the exigent, which being filed in the Court in which the action is pending, the outlawry is complete, and the execution creditor may cause process to be issued against the outlaw at the suit of the Crown,^r called a *capias utlagatum*, returnable into the revenue side of the Exchequer. Of this execution there are two forms; under the one the outlaw may be taken and brought into Court, under the other his body, lands and goods may be taken in execution; and by a petition to the Lords of the Treasury, the creditor may obtain the property in satisfaction of his claim.^s

Reversal of
outlawry for
error.

From the very nature of outlawry, proceeding as it does upon the supposition of the wilful evasion by the debtor of the process of the law, if the debtor is imprisoned or in a foreign country at the time he is adjudged an outlaw, the outlawry will be erroneous, and the debtor may at any time procure its reversal upon the ground of error.^t The outlawry will, however, generally

^q He must, however, be called at five *successive* Courts.

^r As to the advantage of this, see "Execution generally," p. 221, *supra*.

^s Where the claim is under 50*l.*, the Court of Exchequer will order it to be paid without any petition to the Treasury.

^t Co. Litt. 259 b; *Bryan v. Wagstaff*, 5 B. & C. 314; see also 5 Taunt. 309. The judgment of out-

lawry being of a *quasi criminal* nature, and the proceedings thereon being at the suit of the Crown and not of the party in the original cause, the provisions of the Common Law Procedure Act, 1852, as to proceedings in error, will not be applicable to this case; and error, which, it will be observed, is in this case error in fact, must be brought, as formerly, by *writ of error*.

be set aside, upon motion to the Court, upon the debtor giving himself up upon the *ca. sa.*^u The outlawry is also at an end upon the death of the outlaw, and any property remaining undisposed of in the hands of the sheriff will be restored to his representatives upon motion to the Court, and a suggestion on the roll of the death.

The writ of *habere facias possessionem* issues in ejectment, commanding the sheriff to deliver up possession to the plaintiff. With this writ the claimant may have a clause of *fi. fa.* for his costs, or he may have a separate writ of *fi. fa.* or *ca. sa.*

Habere facias possessionem.

In replevin the judgment for the defendant upon a verdict on an avowry or cognizance or upon *non pros.*, is that the goods be returned,^x and the defendant may issue the writ of *retorno habendo* to the sheriff for their return;^y in addition to this, he is also entitled to damages and costs, and may issue the ordinary executions for their recovery.

Retorno habendo.

When upon the application of a party to have goods *replevied*, they cannot be found, and the officer entrusted with the replevy returns the warrant, that the goods are *eloigned*, *elongata*, or taken to places unknown, the party may have a *capias in withernam*, under which, goods of the distrainor, to the same value as those taken, may be seized and kept in pledge and made use of.

Capias in withernam.

^u Chit. Arch. Prac. 1233; *Tynte v. R.*, 7 Q. B. 216.

^x This is not so upon a verdict upon a plea of *non cepit*.

^y The defendant may also avail himself of the remedy against the sureties on the bail bond; and by virtue of the statute 21 Hen. VIII. c. 19, s. 3, a defendant, after avowry or cognizance for rents, customs, services or damage feazant, is entitled, in case the plaintiff should be nonsuit or otherwise barred, to his *damages and costs*, and the de-

fendant may have a writ of inquiry to the sheriff to assess the damages (see 4 Jac. I. c. 3; 8 & 9 Will. III. c. 11; 3 & 4 Will. IV. c. 43, s. 34); and by the 17 Car. II. c. 7, the defendant may also in certain cases, by leave of the Court, have a writ of inquiry to the sheriff to ascertain the amount of rent due in respect of which the distress was taken, and upon the return of the writ he may issue execution in the ordinary way for the amount.

Specific delivery of chattels,

in detinue,
in assumpsit.
19 & 20 Vict.
c. 97, s. 2.

In an action for the detention of a chattel, the jury may be required to find the value of the chattel as well as the damages for its detention, and the judgment² for the plaintiff is, that he recover the chattel detained or its value and the damages; and formerly it was at the option of the defendant either to return the chattel or its value: now, however,^a the Court or a judge have power if they think fit, upon the application of the plaintiff, to order that execution shall issue for the *return of the chattel*, without giving the defendant the option of retaining it upon paying the assessed value; and that if the specific chattel cannot be found, the sheriff shall distrain the defendant by all his lands and chattels until he surrender it, or at the option of the plaintiff that he levy the assessed value.

So, again, it is directed by the Mercantile Law Amendment Act, 1856, that in actions for breach of contract, to deliver specific goods for a price in money, upon the application of the plaintiff, the jury shall by their verdict find what sum the plaintiff would have been liable to pay for the delivery of the goods, and what damages the plaintiff would sustain if the goods should be delivered to him under the execution, and what damages, if not so delivered; and if judgment is for the plaintiff, the Court or a judge, at their discretion, may, upon the application of the plaintiff, order execution to issue on payment of such sum (if any) as shall have been found to be payable by the plaintiff, of the said goods, without giving the defendant the option of retaining them upon paying the damages; and if the goods or any part of them cannot be found, the sheriff shall distrain the defendant by his lands and goods until he deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages or a due proportion thereof.

² As to this judgment, see *Williams v. Archer*, 5 C. B. 318.

^a Common Law Procedure Act, 1854, s. 78.

In both the above cases, however, the plaintiff may issue the ordinary executions for the damages.

In addition to the execution against the debtor's goods and chattels and lands, the creditor may *attach* debts due to the judgment debtor from third persons, and have execution against such person, who is called the *garnishee*. Attachment of debts.

This remedy was introduced by the Common Law Procedure Act, 1854,^b and is similar to the process of *foreign* Proceedings.

^b The following are the principal sections of the act upon the subject:—

“60. It shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this Act.

“61. It shall be lawful for a judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person

(hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the Court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

“62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands.

“63. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

attachment^c that has prevailed from time immemorial in the Lord Mayor's Court of London and in the city of Bristol.

The creditor may, if necessary, obtain a judge's order for the examination of the debtor as to any debts due to him; and the judge has power to order any present or accruing debt to be attached, which order is to be served upon the garnishee; and if the garnishee does not dispute the debt, execution may, upon the order of the judge, issue against him if he do not forthwith pay any present debt or so much as will satisfy the judgment creditor: if, however, the garnishee disputes the debt, the judgment creditor must proceed against him by a writ similar to a writ of summons, except that it calls upon him to show cause why there should not be execution against him; to this writ the garnishee appears, and the judgment creditor thereupon declares, and they then proceed with the pleadings as in an ordinary action; and the trial, judgment and execution are the same in principle as in an ordinary action, there being some slight variation in the forms.^d

The *debt*, to come within the above provisions, must be an actual and *ascertained debt*, such as could have been the subject of a set-off.^e

"64. If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under 'The Common Law Procedure Act, 1852.'

"65. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed."

^c See Locke on Foreign Attachment; *Wadsworth v. Queen of Spain*, 17 Q. B. 171; *Webb v. Hurrell*, 4 C. B. 287.

^d See Chit. Forms, Attachment of Debts.

^e *Johnson v. Diamond*, 24 L. J., Exch. 217; *Westoby v. Day*, 22 L. J., Q. B. 418.

Writ.

Pleadings,
trial, execu-
tion.

When the judgment authorizes it, there may issue in addition to execution, a writ of *mandamus*,^f or *injunction*;^g the former commanding the defendant to perform some duty, and the latter to abstain from committing or continuing some wrongful act or breach of contract. Mandamus and injunction.

These writs are directed to the defendant in person, and disobedience to them is punishable by attachment.^h

In the case of disobedience of a mandamus, the Court may, either instead of or together with attachment, direct that the act be done by the plaintiff or some person appointed by the Court, at the expense of the defendant, which expense will be ascertained by a writ of inquiry or a reference to the master, and may be levied by execution in the ordinary way.

It may be here repeated, that the injunction may be obtained upon an *ex parte* application to the judge at any time after the commencement of the action; so that in fact a writ of summons, indorsed with a notice of intention to claim an injunction, may be taken out, and immediately afterwards, and even before the service of the writ of summons, the plaintiff may apply to a judge for an injunction, which will be ordered to issue if the urgency of the case requires it.

^f Common Law Procedure Act, 1854, ss. 79—82, and p. 61, *supra*.
1854, ss. 68—74, and p. 64, *supra*. ^h See p. 37, *supra*.

^g Common Law Procedure Act,

CHAPTER XVI.

ARREST ON MESNE PROCESS AND BAIL.

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Appearance to
action in
ancient times.

IN ancient times, when actions were commenced by *original*, the ordinary appearance of the defendant in obedience to the writ consisted of his entering a memorandum on the roll, together with two sureties or pledges, to defend.

In a very short time the practice with regard to the sureties was much relaxed, and like the plaintiff's pledges to prosecute they were allowed to be merely nominal persons, usually John Doe and Richard Roe.

If, however, the defendant did not appear according

to the exigency of the *original*, his compliance was enforced by certain judicial *writs of process*.^a

Writs of process.

Of these writs the most important was the *capias ad respondendum*. This writ, which issued only in certain personal actions, commanded the sheriff to take the body of the defendant if he was to be found in his bailiwick and him safely keep, that he might have him in Court on the return of the writ *to answer the plaintiff* of his plea.

Capias ad respondendum.

When the action was commenced by *bill*, this *process*, which in the Queen's Bench was called the *bill of Middlesex and latitat*, and in the Exchequer the *writ of quo minus*, was the commencement of the action. In course of time it became the recognized and established practice in actions by *original* also, to sue out the *capias* in the first instance, in reference to a supposed original and default of the defendant thereon. The original was in fact not taken out at all, unless it became necessary in order to support the regularity and validity of the subsequent proceedings; the *præcipe*^b for the original was, however, always deposited with the officer when the *capias* was taken out, so that the original itself might have been obtained at any subsequent time, dated of the date of the *præcipe*.

Thus, the arrest on the *capias* became practically the commencement of the action, in those cases to which it was applicable, and the first intimation that a defendant received that an action had been brought against him was to find himself in the custody of the sheriff's officer.

The arrest the commencement of action.

By the 1 & 2 Vict. c. 110, the arrest on *mesne process* as a means of commencing an action was abolished, and the writ of *capias ad respondendum* retained, merely as a collateral process,^c issuing after the regular commencement of the action, and then only if there is pro-

1 & 2 Vict. c. 110.

^a See p. 11, *supra*.

^b See p. 10, *supra*.

^c See the modern practice, p. 251, *infra*.

bable cause for believing that the defendant is about to quit England, unless forthwith apprehended.

The new process is confined exclusively to those actions in which the defendant was previously liable to arrest, and the modern practice is entirely founded on the ancient. It will be desirable, therefore, for a moment to return to this.

In what actions the *capias* issued.

At common law the writ of *capias ad respondendum* issued only in actions of *trespass*, which was regarded as being of a criminal nature; however, by the Statute of Marlbridge (in the 52 Hen. III.), c. 23, and the Statute of Westminster the Second (in the 13 Edw. I.), c. 11, it was extended to all actions of account, and by the statute the Fifth of 25 Edw. III. c. 17, and the 19 Hen. VII. c. 9, to actions of *debt*, *detinue* and all *actions on the case*, which included *assumpsit* and *trover*.

Originally, when the defendant was arrested^d on the *capias* he had no alternative but to remain in the custody of the sheriff until the return of the writ, in order that he might be compelled to enter an appearance to the action.

Appearance required on the *capias*.

The appearance, also, under these circumstances was practically very different to the common appearance. In this case the relaxation of the rule as to the sureties was not allowed, and the defendant was obliged, in order to perfect his appearance, to procure substantial sureties; in default of his doing which, he remained in custody. If, however, he procured two responsible sureties, he was delivered or *bailed* to them upon their making a formal *recognizance* or acknowledgment in Court, that they pledged themselves that the defendant should either be *rendered* a prisoner or pay the amount for which he might be condemned in the action. This was called

Special bail as distinguished from common bail.

^d If he evaded process he might have been pursued to *outlawry*; see "Outlawry," p. 235, *supra*, and p. 251, *infra*; but now outlawry on

mesne process is abolished by Common Law Procedure Act, 1852, s. 24.

putting in *special bail* to the action, in contradistinction of the nominal or *common* bail above mentioned.

The mode of putting in the special bail was this, the two sureties made an oral acknowledgment or *recognizance* before the Court or one of the judges, or, in later times, a commissioner appointed for the purpose, binding themselves in a penalty conditioned for one of the three following alternatives; that the defendant should be rendered a prisoner, or that he should pay the amount for which he might be condemned in the action, or that they should pay it for him. This recognizance was then entered on a slip of parchment called the *bail piece*; this, for the time, was left with the officer of the Court or Chambers, where the recognizance had been entered into, and a formal notice was in the next place required to be sent to the plaintiff, that *bail had been put in*, stating who they were, in order that he might have an opportunity of inquiring into their sufficiency, and of taking exception to them if he thought proper. The bail was not considered to have been put in until this notice had been given.

Putting in special bail.
The recognizance.

The bail piece.

Notice of bail.

If upon this the plaintiff did not, within twenty days, give notice of and enter with the officer an *exception* to the bail, they became *absolute*, and the bail-piece was given up in order to be filed of record in the Court. If, however, the plaintiff duly entered and gave notice of exception, it became necessary for the bail within a certain time to return a notice,^e that they would on a stated day *justify* themselves, that is to say, would meet the objections made by the plaintiff and prove themselves

Excepting to bail.

Filing bail-piece.

^e At the present day the bail may justify at the same time that they are put in, if four days' notice of their intention to do so be given to the plaintiff, together with an affidavit of their sufficiency. See Reg. Hil. Term, 1853, rr. 96—101, *infra*. And in this case the plain-

tiff must give at least one day's notice of his intention to oppose them. The advantage to the defendant in adopting this course is, that if the plaintiff fails in his opposition, and the bail justify, the plaintiff pays the costs.

Perfecting bail. duly qualified and responsible persons; and when they had succeeded in doing this they were *perfected*, the bail-piece was given up to be filed, and the defendant was delivered to his bail, in whose friendly custody he was supposed to remain instead of going to prison.

Bail de bene esse.

If the plaintiff consented to it, the bail might have been put in *absolute* in the first instance, and the defendant was at once delivered; when, however, this was not done, he was not delivered until the bail were *perfected*, and until this was done the bail were said to have been put in merely *de bene esse*, that is, contingent upon their turning out to be good.

23 Hen. VI.

Originally, as it has been already stated, the defendant, upon being arrested on the *capias*, had no alternative but to remain in the custody of the sheriff. However, by the 23 Hen. VI. c. 9,^f it was enacted, that if any defendant so in custody procured two sureties, having sufficient property in that county, to enter into a bond with the sheriff, conditioned for the defendant's *appearing to the action*, according to the exigency of the *capias*, the sheriff should deliver him from custody.

Bail bond.

The sheriff might also at all times, upon his own responsibility, have allowed the defendant to go at large, but he ran this risk, that if the defendant afterwards made default, and did not appear according to the exigency of the *capias*, the sheriff became liable to an action^g at the suit of the plaintiff for an *escape*.

^f Previously to this statute the sheriffs farmed out their office, and the farmers made great profits out of defendants in their custody, exacting from them heavy fees, and also bonds, conditioned for the payment of future sums, for what they termed *ease and favour*, during their imprisonment. This statute abolished this practice of farming the office of sheriff, and also put a stop to the extortions that had

sprung up with it. The sheriff is now bound to take the bond, and all other agreements entered into between the sheriff and the defendant are void; and if the sheriff lets the defendant go without the bond, he will be liable for an *escape*, if the defendant is not rendered on the return day of the writ, or special bail put in and perfected in proper time.

^g The action is now an action

By the stat. of Henry VI. the sheriff was bound to take the *bail bond*, and release the defendant if sufficient sureties were offered, but he was obliged, at his own risk, as will presently be seen, to take care that he did not accept insecure bail.

Escape and rescue.

The appearance thus required, in order to fulfil the condition of the *bail bond*, was not, it will be observed, the mere common appearance, but such an appearance as would have been required on the *capias*, namely, with *special bail*, and the condition was not fulfilled, nor the bail to the sheriff discharged, unless special bail to the action, or, as it now came to be called, in contradistinction of the sheriff's bail, *bail above*, was put in and perfected in proper time.

Condition of the bail bond.

The proper time for putting in the special bail was, strictly speaking, upon the return day of the writ, but in fact the defendant was entitled to *eight days of grace* after the return day to put them in, and there was considered to have been no default until after the expiration of the eight days.

Thus the position and the obligation of the bail to the action, and the bail to the sheriff under the stat. of Hen. VI., differed very materially.

Difference of the obligation of sheriff's bail and bail to the action.

on the case, 5 & 6 Vict. c. 98, and in order to maintain the action the plaintiff must have sustained some damage. *Williams v. Mostyn*, 7 Dowl. 38. After thus allowing the defendant to go at large, the sheriff might have recaptured him at any time before the return of the *capias*, (*Atkinson v. Mattison*, 2 T. R. 172,) but not after the return day. The writ being now returnable immediately after execution, the sheriff cannot take the defendant again into his custody after the day upon which he is arrested. 3 A. & E. 765. If, however, the defendant escaped from the sheriff without

his permission, he might have been retaken at any time, and if the sheriff retook him before an action for an escape had been commenced, he was not liable.

If the defendant had been forcibly rescued from the sheriff, he might have returned the writ to that effect, and he would not have been responsible for the rescue, as upon a *ca. sa.*, although, even in executing *mesne process*, he was bound to come provided with sufficient force to overcome any resistance that might have been expected. *Howden v. Standish*, 6 C. B. 504.

Render of the
defendant.

The condition of the *recognizance* being in the alternative, that either the defendant should go to prison or the money be paid, the bail to the action could at any time have exonerated themselves by *rendering* the defendant a prisoner; and this they could have done the moment after entering into the recognizance, and consequently before justifying.

Putting in
special bail to
render.

The case of the sheriff's bail was, however, very different. The bail bond, being conditioned solely for the appearance of the defendant with special bail to the action, could be fulfilled in no other way,^h and therefore the bail could not release themselves by rendering their principal to the sheriff. If, however, they were apprehensive that the defendant would not be able to put in special bail to the action, and were desirous of being discharged from their liability, they were able to do so in the following way. Immediately that the *capias* was returnable, they put in any two persons as special bail for the defendant, and caused them immediately and before the time for their justification to *render* the defendant to prison, which at once discharged both themselves and the bail below.

Prisoner su-
perseded.

Upon the appearance of the defendant to the action as a prisoner, the plaintiff was bound to proceed with the action within a certain time,ⁱ otherwise the prisoner became *supersedeable*, that is, entitled to his discharge.

Ruling sheriff
to return the
writ.

It has already been stated that the sheriff was bound at his peril not to accept insecure sureties on the bail bond, the explanation of which is this:—If after the defendant had been released on the bail bond, he failed to appear and put in special bail to the action in proper time, the plaintiff might have ruled the sheriff to return

^h See p. 250, *infra*, as to the alternative given to the defendant by the 7 & 8 Geo. IV. c. 71, in lieu of putting in special bail to the action, to pay money into Court,

which also operated as a fulfilment of the condition of the *bail bond*.

ⁱ See now Reg. Hil. Term, 1853, r. 123, *et seq.*, *infra*.

the writ, which he could only truly^k return *cepi corpus*; upon this return the plaintiff might have ruled him to bring in the body, upon which if he neither brought the defendant, nor caused special bail to be put in for him, it was a *contempt* of Court, and he might have been proceeded against by attachment,^l from which he would only have been relieved upon paying the plaintiff's claim or putting in special bail for the defendant. The sheriff at the same time had his remedy against the sureties by action on the bail bond; his only security therefore depended upon their being substantial.

Attachment
against sheriff.

The plaintiff, however, was not obliged thus to proceed against the sheriff. By virtue of the 4 & 5 Ann. c. 16, he might have taken an assignment of the bail bond from the sheriff, and have sued the bail thereon himself. By doing this, however, he relinquished his right to proceed against the sheriff.

4 & 5 Ann.
c. 16, assign-
ment of bail-
bond.

By the joint operation of the statutes 12 Geo. I. c. 29, 5 Geo. II. c. 27 and 21 Geo. II. c. 3, it was enacted that the sheriff, upon the receipt of the *capias*, should not arrest nor hold the defendant to special bail unless the plaintiff had sworn that he had a cause of action amounting to not less than a certain sum, and had indorsed the sum on the writ, but otherwise should merely serve the defendant with a copy of the writ, and a notice to enter a common appearance to the action.

Defendant not
to be held to
special bail
except for a
certain amount.

This had the effect of reducing the *capias* in actions below the arrestable amount to a mere summons to appear, which was complied with by the defendant's entering a common appearance with common bail; and if he failed to do so, the plaintiff was at liberty to file an appearance with common bail for him, and to proceed as if he had regularly appeared.

The amount thus required to be sworn to and indorsed on the writ, in order to hold the defendant to special bail,

7 & 8 Geo. IV.
c. 71.

^k And if he returned otherwise, *false return*.
he was liable to an action for a

^l See "Attachment," p. 37, *supra*.

was different at different times: by the 7 & 8 Geo. IV. c. 71, it was fixed at 20*l.*, exclusive of costs, at which amount it remains at present.

When a judge's order was required.

According to the practice established upon these statutes, a defendant could not have been held to special bail as of course, except in actions of *debt*, or in cases where the amount of the plaintiff's claim could be ascertained by mere calculation; in all other cases the defendant could only be arrested upon the additional authority of a *judge's order*; and if improperly arrested would, upon application, have been immediately discharged, or the bail bond cancelled, or the bail to the action exonerated from their recognizance, as the case might be, upon the defendant entering a common appearance to the action.

By this time the action of *trespass*, which at common law was the only one in which the defendant could have been arrested, came to be the one in which the arrest was least frequently allowed of any, the judge's order never being granted in this action except in very aggravated cases.

43 Geo. III. c. 46, deposit with sheriff in lieu of bail-bond.

By the 43 Geo. III. c. 46, the option was given to the defendant, when arrested on *mesne process*, to deposit with the sheriff, *in lieu* of giving the *bail bond*, the amount indorsed on the writ, together with 10*l.* to answer for the costs, which sums he forfeited if he did not within eight days put in special bail to the action.

7 & 8 Geo. IV. c. 71, deposit in Court in lieu of recognizance.

This provision was subsequently extended by the 7 & 8 Geo. IV. c. 71, so as to give the defendant the option, *in lieu* of putting in *special bail* to the action, to pay into Court the sums above mentioned, together with an additional 10*l.* for the costs, to abide the event. He was also at liberty, after so paying money into Court, to take it out again at any time upon putting in special bail, or having put in special bail, to pay the money in and exonerate the bail from their recognizance.

The law was in this state when the Uniformity of

Process Act, 2 Will. IV. c. 39, enacted that all personal actions, in which it was not intended to hold the defendant to special bail, or to proceed against a trader member of parliament under the Bankrupt Act of Geo. IV., should be commenced by a *writ of summons*,^m and if the defendant could not be served, a writ of *distringas* was to issue against his goods to compel him to appear, and if this was without effect the plaintiff was at liberty either to enter an appearance for him, or to proceed to *outlawry*ⁿ against him.

Uniformity of Process Act, 2 Will. IV. c. 39.

Writ of summons.
Distringas.

Certain provisions, since repealed, were also made as to the writ of *capias*, which was directed to be the commencement of the action in all cases in which it was intended to hold the defendant to special bail.

Writ of *capias*.

In the next place came the sweeping changes effected by the 1 & 2 Vict. c. 110, by which the modern practice was founded. By sects. 1 and 2 of this statute, it was enacted that thenceforth no person should be arrested on *mesne process*, except in the cases subsequently mentioned, and that every personal action whatsoever should be commenced by *writ of summons*.

1 & 2 Vict. c. 110.

Arrest on *mesne process* as commencement of action abolished.

It then goes on to enact by sect. 3, that if a plaintiff in any action in which the defendant was *previously liable to arrest*, whether upon the order of a judge, or without such order, shall by affidavit of himself or some other person, show to the satisfaction of a judge that such plaintiff has a cause of action against the defendant to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England unless forthwith apprehended, it shall be lawful for such judge, by a *special order*, to direct that the defendant shall be held to bail for an amount not exceeding the amount of the debt or damages, and thereupon it shall be lawful

The new *capias*.

Upon affidavit of action to 20*l.* or upwards, and defendant about to quit England.

^m See p. 19, *supra*.

ⁿ See p. 235, and 244, *supra*. The *distringas* and proceedings to out-

lawry on *mesne process* were abolished by the Common Law Procedure Act, 1852, s. 24.

for the plaintiff to sue out one or more writs of *capias* into different counties in the form given in the schedule to the act.^o

By sect. 4, it is enacted that the defendant when arrested^p shall be detained in custody until he gives a bail bond to the sheriff or deposits the sum indorsed on the writ with 10*l.* for costs, according to the former practice; and that all the subsequent proceedings, as to putting in and perfecting special bail, shall be the same as near as may be as under the ancient practice.

Writ to issue at any time after action commenced.

The special order of the judge may be made and the defendant arrested at any time of the year, whether in term or vacation, and at any stage of the cause *after* the issuing of the writ of summons and before judgment; and if when arrested the defendant has not yet been served with the writ of summons, he may be served with it when in custody.

14 & 15 Vict. c. 52, absconding debtors arrested on a warrant of Bankruptcy Commissioner or County Court judge.

In the case of *absconding debtors*, the arrest of the defendant in country cases has been made much more summary by the provisions of the 14 & 15 Vict. c. 52. Power is thereby given to the Commissioners in Bankruptcy for country districts, and also to the judges of the County Courts, except in Middlesex and Surrey, upon the application of a creditor, and upon proof by affidavit to their satisfaction, that a debt of 20*l.* is owing and then payable from the person against whom the application is made, and that there is probable cause for believing that such debtor, unless forthwith apprehended, is about to quit England with intent to avoid or delay the creditor, or to remain away so long that the creditor will be delayed in the recovery of the debt, to grant a warrant authorizing the arrest of the debtor at any time within seven days of the date of the warrant.

Capias to be sued out.

Upon this warrant the defendant may be detained in custody until he either gives bail, makes the usual deposit,

^o See the form, Lush's Prac., 530, or Chit. Forms.

^p See p. 255, *infra*.

or pays the debt and costs; provided that within seven days of the date of the warrant the creditor sue out a *capias* and serve^q it upon the debtor if he still remains in actual custody; and if the creditor has not already commenced an action, he must at once do so before suing out the *capias*. The debtor will then be deemed to have been arrested by virtue of the *capias*, and all proceedings may be had thereon as if it had been issued before the warrant and arrest.

The defendant therefore can only be arrested on *mesne process* in the actions of *account*, *assumpsit*, *debt*,^r *detinue*, *trespass*, *trover* and *case*, and in these only after the action is commenced, and on the special *order of a judge*,^s who must have been satisfied by affidavit that the plaintiff has a cause of action amounting to not less than 20*l.*, and that there is probable cause for believing that the defendant is about to quit England.

In what actions defendant arrested.

The defendant cannot be held to bail in any real or mixed action, nor in actions on replevin or bail bonds, nor upon proceedings by *scire facias*.

Where a defendant has been once arrested, he cannot, in general, be arrested a second time by the same plaintiff for the same cause of action;^t nor can a party, sued merely in a representative character, be arrested; therefore executors, administrators and heirs sued as such, and who have done nothing to make themselves personally responsible, cannot be held to bail.

Cannot be arrested a second time.

Executors and heirs.

Not only does the right to hold the defendant to special bail not extend to all cases, but there are certain

Privilege from arrest.

^q *Masters v. Johnson*, 8 Exch. 63; *Eld v. Vero*, *id.* 655.

Edw. III. See p. 244, *supra*, and "Debt," p. 59, *supra*.

^r There is one apparent exception amongst the actions of "*covenant*," namely, that where the covenant is to pay a *sum certain*, the defendant may be held to bail; the fact is, however, that this is an action of *debt* within the statute of

^s Or, the warrant of a Commissioner or County Court Judge in the cases above mentioned within the Absconding Debtors' Act.

^t *Housin v. Barrow*, 6 T. R. 218; Chit. Arch. 680.

persons who are privileged from arrest, some temporarily, others permanently.

The Royal Family, and the servants in ordinary of the reigning monarch, also peers of the realm and peeresses,^t as also peers and peeresses of Ireland^u and Scotland,^x the Judges of the Superior Courts, Ambassadors and ministers of foreign states and their domestics and domestic servants have all a permanent privilege from arrest.

Members of the House of Commons are privileged during the session of parliament, and forty days before and after, *eundo et redeundo*. *Barristers* are privileged during their attendance in, and in going to and from, Court or judges' chambers and also on circuit, whether they have actual business or not.^y *Clergymen*,^z *bonâ fide* performing divine service, and also in going and returning, and also members of convocation during the session, and *coroners*, whilst in the execution of their office, are privileged.

All parties connected with and *attending in the course of a cause, eundo et redeundo*, such as the principals, their attornies, witnesses and bail, are privileged. Formerly, attornies were in other cases also privileged, but as this privilege was forfeited upon their intending to quit England, and as this is now the only case in which any one can be arrested, they are necessarily placed on the same footing as other persons, nor have they any privilege as attornies from arrest on final process.

Certificated *bankrupts*^a and discharged *insolvents*^b cannot be held to special bail for any cause of action to

^t Peeresses by marriage, if they afterwards marry commoners, lose their title and privileges. Co. Litt. 16, b.

^u 39 & 40 Geo. III. c. 67, s. 4.

^x 5 Ann. c. 8, art. 23.

^y *Sheriff of Kent's case*, 2 Car. &

K. 197; *id.* 200, and 1 H. Bl. 636.

^z 50 Edw. III. c. 5; 1 Ric. II. c. 15; stat. 8 Hen. VI. c. 1; 9 Geo. IV. c. 31, s. 23.

^a 12 & 13 Vict. c. 106, s. 205.

^b 1 & 2 Vict. c. 110, s. 90; see also 5 & 6 Vict. c. 116, s. 2.

which the certificate or discharge might be pleaded in bar.

Petty officers and seamen^c in her Majesty's service are privileged, in the case of every debt contracted subsequently to their entering the service, and all debts under 30*l.* contracted previously. In the same manner *soldiers and marines* are protected by the Annual Mutiny Acts.

The affidavit^d to hold to bail is required to be very carefully prepared; it must set out the nature of the cause of action, and if any variance occurs between the cause of action in the declaration and that set out in the affidavit, the defendant will, upon application, be at once discharged, or the bail exonerated, or the money paid out of Court, as the case may be. The affidavit.

The *capias* at present commands the sheriff to take the defendant and him safely keep, until he gives bail or makes deposit according to law. And it requires the defendant to take notice that he must put in special bail to the action within eight days. The capias.

The writ having been put into the hands of the sheriff, he proceeds to execute it in the same manner as upon final process.^e The only difference between them is this, that by the 32nd Geo. II. c. 28, it is enacted, first, that the sheriff or officer upon arresting a party on *mesne process*^f shall not take him to any tavern or public-house, nor to the house of such officer or of any relation or tenant of his, without the consent of the person arrested; secondly, that he shall not take the prisoner to gaol within four-and-twenty hours of the arrest, unless he refuses to be carried to some safe and convenient dwelling-house of his own nomination; and the officer must inform^g the prisoner that he is at liberty to go to any house except his own in the town or city, if he was The arrest.

32 Geo. II.
c. 28, defend-
ant not to be
taken to prison
in the first in-
stance.

^c 1 Geo. II. st. 2, c. 14; 32 Geo. III. c. 33, s. 22; 3 & 4 Will. IV. cc. 5 and 6.

^d See Lush's Prac. 525.

^e See "Ca. sa." p. 233, *supra*.

^f *Evans v. Atkins*, 4 T. R. 555.

^g *Simpson v. Renton*, 5 B. & Ad. 35; *Gordon v. Laurie*, 9 Q. B. 60.

arrested in a town or city, or within three miles, if in the country.

Proceedings
after arrest.

Upon being arrested, the defendant will be detained in custody until he either gives the sheriff a *bail bond*,^h under the stat. of Hen. VI., with sureties, having sufficientⁱ property within the county, or deposits the money indorsed on the writ, with 10*l.* for costs, pursuant to the stat. 43 Geo. III. c. 46.

The sheriff is also bound to release the defendant upon receiving a written authority from the plaintiff or his attorney to discharge him; and also if the defendant pays the plaintiff his whole claim and costs.

Application for
discharge.

The defendant may also, if improperly arrested, apply to the Court or a judge for his discharge, for example, upon the ground of being privileged, or that the cause of action is not one for which he is liable to arrest, or that the supposition of his being about to quit England is without foundation; and upon this application he may contradict upon affidavit all or any of the facts in the plaintiff's affidavit, and he may even show that no debt exists;^k and if successful he will be *discharged*, and either released from custody, or the bail bond cancelled, or the deposit repaid by the sheriff, as the case may be.

Affidavits in
opposition.

If the defendant is delivered upon a bail bond, or upon depositing money with the sheriff, and is not thus discharged, he must, within eight days of the arrest, either put in special bail to the action, or deposit money in Court according to the provisions of the 7 & 8 Geo. IV. c. 71. If he fails to do so, the plaintiff may either take an assignment of the bail bond and sue the sureties thereon, or proceed against the sheriff as already mentioned,^l or in case of a deposit with the sheriff in lieu of bail, this is forfeited,^m and may be taken out of Court by the plaintiff.

^h See p. 246, *supra*.

ⁱ The security must be good, for a penalty equal to double the amount indorsed on the writ.

^k *Stammers v. Hughes*, 2 Jur. (N.S.) 572, C. P., affirming *Pegler*

v. Hislop, 1 Exch. 437, and overruling *Copeland v. Child*, 1 B. C. C. 176; 17 Jur. 406.

^l See p. 248, *supra*.

^m See p. 250, *supra*.

But even after the bail bond has been forfeited and an action has been commenced upon it, the Court has power under the 4 & 5 Ann. c. 16, s. 20, by *rule of Court*, to afford such relief to the parties in the original action as shall be agreeable to justice; and such rule is to have the effect of a *defeazance* or further condition to the bail bond. The most usual relief is, to stay proceedings on the bond, upon *special bail* being put in, and, at the same time, to order the bond to stand as an additional security for the plaintiff; and when this is done, the plaintiff is at liberty to sign judgment upon it.^m

Staying proceedings on bail bond.

Bond to stand as security.

The putting in the special bail is done according to the old practice already referred to, except so far as it is modified by the Rules of Practiceⁿ of 1853.¹

Putting in, excepting to and justifying bail.

If the bail are *excepted*^o to they must *justify*^p themselves, and meet the objections made to their qualification by the plaintiff.

The qualifications of the bail to the action, and the principal grounds for excepting to them, are the following:—

In the first place, they must be housekeepers or freeholders,^p and each must be worth double the amount sworn to by the plaintiff, over and above what will pay his just debts and every other sum for which he is bail, or if the sum sworn to exceeds 1,000*l.*, then he must be worth 1,000*l.* beyond the sum sworn to.

Qualifications of bail.

The bail must not be foreigners^q nor persons privileged from arrest.^r Practising attorneys and attorneys' clerks, and sheriffs' officers and others concerned in the execution of process are also incompetent.

^m Reg. Hil. Term, 1853, r. 84, *infra*.

^q *Boddy v. Leyland*, 4 Bur. 2526.

ⁿ See 245, *supra*, and Reg. Hil. Term, 1853, rr. 81—111.

^r *Graham v. Sturt*, 4 Taunt. 249; *Glead v. Mackay*, 2 W. Bl. 956.

^o See p. 245, *supra*.

^p *Smith's Bail*, 1 Dowl. 1; *id.* 127.

It is also a sufficient objection to bail that they are hired.^s It is also ground of suspicion, requiring explanation, if they do not know the defendant.^t

There are also objections of another class, founded upon imperfections and irregularities in the proceedings, for example, if the bail are imperfectly described in the notice of bail, or if a wrong attorney or wrong Court is stated, or if there has been irregularity in the service of the notices. Amendments of these defects will generally be allowed on terms, and the plaintiff will not be allowed to take advantage of them if he has really not been prejudiced.

Exoneration of the bail to the action.

There are several ways in which the bail^u after having entered into recognizance may be exonerated; in the first place, they can at any moment exonerate themselves by *rendering* their principal to prison; or if there is a variance between the declaration and the cause of action stated in the affidavit upon which the defendant had been originally held to bail; or if any arrangement is come to without their consent between the plaintiff and their principal, which puts them in a different position, as where further time is given to the defendant to pay; or if their principal dies or becomes privileged, or it becomes otherwise impossible by act of law to render him, they will be exonerated; and, lastly, they may at any time before they have justified strike their names out of the bail-piece.

Fixing and proceeding against the bail on their recognizance.

If the defendant has put in bail to the action, and has been condemned therein, the bail, if they had not been exonerated, must see that he pays the amount, or they must pay it themselves or render their principal to prison; if they do none of these, their recognizance is forfeited, and they are liable to an action thereon at the suit of the plaintiff.

Before, however, the plaintiff can commence proceed-

^s *Browne v. Brown*, 4 Bing. 38.

^t 1 Dowl. 1.

^u As to the sheriff's bail, see p. 248, *supra*.

ings upon the recognizance, he must *fix* the bail, that is to say, he must issue a *ca. sa.* to the sheriff against the defendant in the original action, returnable on a day certain, not less than eight days from its teste; this writ must also be entered in the book kept in the sheriff's office^x for the purpose. The sheriff returns the writ in this case *non est inventus* as a matter of course, and upon its return the bail are *fixed*.

The plaintiff may then proceed against the bail, either by an action of *debt* on the recognizance, or by *scire facias*.^y If, however, the bail render their principal within eight days of the service of the process upon them and give notice thereof, the proceedings against them are stayed upon their paying the costs of the writ and service.^z

^x *Russel v. Dickson*, 6 Bing. 442;
Reg. Hil. Term, 1853, r. 75, *infra*.

^z Reg. Hil. Term, 1853, r. 108,
infra.

^y See p. 226, *supra*.

CHAPTER XVII.

COSTS.

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Costs.

COSTS are those sums of money which the law allows the successful party to recover from his opponent for the expenses he has been put to in prosecuting or resisting the proceedings, as the case may be.

At common law.

At common law the successful party was in no case entitled to recover *costs* as such.^a It is true that the plaintiff frequently obtained costs substantially, as the expenses to which he had been put were taken into consideration by the jury in assessing the damages.^b

Plaintiff's costs.

The right to recover costs, therefore, must in all cases depend upon some statute.

Statute of Gloucester.

By the stat. of Gloucester, 6 Edw. I. c. 1, it was enacted that in all actions where the party was to recover *damages*, the demandant or *plaintiff* should recover against the

^a 2 Inst. 288.^b Gray on Costs, p. 1.

tenant or defendant the costs of his writ, together with his damages. This extended to all personal and mixed actions;^c and as Lord Coke observes, the *costs of the writ* are taken to extend to all the *legal costs of the suit*,^d but not to the expenses of travelling or loss of time.

Even subsequently to this statute, the plaintiff's costs continued and still continue to form parcel of the *damages* recovered in the cause; and in ancient times they were occasionally assessed by the jury in one gross sum.

Costs, part of damages.

The final assessment of the costs, at the trial must, however, have been very inconvenient; and, indeed, could never have been complete, since costs are incurred subsequently to the trial: and thus at an early period we find that it became the practice for the jury, in all cases, to assess the damages and costs separately, and for the Courts afterwards to award to the plaintiff such additional sum, by way of *increased costs*, as they considered he was entitled to.

At the present day the assessment of costs by the jury is merely formal; a nominal sum of 40s. for costs is in all cases entered in the *postea*, and the substantial amount, under the designation of *costs of increase*, is afterwards awarded by the judgment of the Court. This amount the Courts assess through their officers appointed to *tax the costs*. Their taxation is subject to revision by the Courts; and in case it can be made out that the officer in taxing the costs has proceeded upon a wrong principle, the Court will direct him to *review his taxation*.

Increased costs.

Taxation of costs.

Review of taxation.

With respect to the costs in actions which have been given by statute subsequently to Statute of Gloucester, the rule seems to be, that in all cases in which the plaintiff recovers *damages*, he is entitled^e to his costs, under the stat. of Gloucester, with one exception, namely—where his right of action is acquired only by the fact of his bringing the action, as in the case of a common informer

^c See pp. 12—39, *supra*.

^d 2 Inst. 288.

^e *College of Physicians v. Harrison*, 9 B. & C. 524.

Defendant's
costs.
23 Hen. VIII.
4 Jac. I.
Nonsuit.
Verdict.

suing for a penalty, in such case he will be entitled to no costs, unless they are given by the particular statute.^f

The defendant's right to costs, in general, rests upon the statutes, 23 Hen. VIII. c. 15, and 4 Jac. I. c. 3, whereby it was provided that if the plaintiff should be *nonsuited*, or a *verdict* should pass against him in any action in which, if he recovered, he would have been entitled to costs, the defendant should have judgment to recover his costs to be assessed at the discretion of the Courts.^g

Nolle prosequi,
non pros.

The term *nonsuit* in these statutes is taken to include a *nolle prosequi*,^h and a *non pros*.ⁱ

Discontinu-
ance.

In the case of a *discontinuance*, as Mr. Gray observes, no statute was necessary to give the Courts the power of awarding costs to the defendant. The plaintiff could not enter a discontinuance as of right; and in granting leave, the Courts had the power of imposing what conditions they thought proper.

Demurrer.

The 8 and 9 Will. III. c. 11, s. 2, and 3 & 4 Will. IV. c. 42, s. 34, gave costs to the defendant in case of judgment in his favour upon *demurrer*, and the 3 & 4 Will. IV. c. 42, s. 32, enacted, that in case of a *nolle prosequi*, as to one of several defendants, he should have his reasonable costs; and in case of a verdict for one of several defendants, he should have his costs, unless the judge should certify on the record that there was reasonable ground for making him a defendant.^k

Several de-
fendants.

Executors and
administrators.

These statutes, however, did not entitle defendants to costs in actions by executors or administrators suing

^f *Cresswell v. Houghton*, 6 T. R. 359; 7 T. R. 267.

^g The statute 18 Eliz. c. 5, s. 3, gave the defendant his costs in an action by a common informer. *Wilkinson, qui tam, v. Allot*, Cowp. 366; *Kirkham v. Wheeley*, 1 Salk. 30.

^h It is sometimes assumed that the defendant's right to costs on

discontinuance and on *nolle prosequi* depends on the 8 Eliz. c. 2, and 13 Car. 2, st. 2, c. 2; but see the objections to this view in Gray, 264, 273.

ⁱ 1 T. R. 371; Gray, 262.

^k *Aaron v. Alexander*, 3 Camp. 35; 4 Camp. 136; see Gray, 94.

in *right of the deceased*;¹ but by the 3 & 4 Will. IV. c. 42, s. 31, defendants are entitled to their costs against executors and administrators suing as aforesaid, unless the Court or a judge *otherwise order*.^m

By the 18 & 19 Vict. c. 90, in actions and proceedings at the suit of the Crown, costs are to be recovered by either party, as in cases between subject and subject.

Actions at suit of the Crown.

In the case of a single and indivisible issue raised in the cause, the award of costs is a very simple matter. It becomes, however, more or less complicated when there are several issues or a divisible issue, and both parties are successful as to part.ⁿ

Costs of issues.

At all times the plaintiff might have had several counts in his declaration, and in many cases he might have included in one count several distinct claims; in such cases it is obvious that the plaintiff might have succeeded in establishing one or more of his claims, and failed in respect of others.

Whenever the plaintiff succeeds in establishing any portion of his claim, he has always been entitled to the general costs of the cause.^o But the principles upon which the taxation of costs should proceed in respect of the issues upon which the plaintiff failed were for a long time much doubted. It is thought that upon the

¹ 2 A. & E. 785.

^m Such order, to deprive the defendant of costs, will only be granted in case of clear *mala fides* on his part, and where he has by *fraud* or *misrepresentation* lured the executor or administrator into prosecuting a suit that otherwise he would not have done. 1 Scott, 173; 3 Dowl. 137. Mere silence or concealment of his defence, however, is not sufficient. *Redmayne v. Moore*, 2 Jur. N. S. 691.

ⁿ By the Common Law Procedure Act, 1852, s. 75, pleas of

payment, set-off, and all pleadings capable of being construed distributively, shall be so construed, and if so much thereof as shall be sufficient answer to the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant for so much, and for the plaintiff for so much of the causes of action as shall not be so answered. See as to *divisible issues*, Gray on Costs, 41.

^o See p. 278, note A., *infra*.

true construction of the Statute of Gloucester that the plaintiff was not entitled to recover any costs in respect of the issues upon which he failed; and further, that by the statute of 4 Jac. I. the defendant was entitled to *his* costs upon such issues.^p

4 Ann. c. 16,
C. L. P. Act,
1852.

The stats. 4 Ann. c. 16, and the Common Law Procedure Act, 1852, s. 81, in authorizing the pleading of several matters, provide that the costs of any issue, whether of law or fact, shall follow the finding or judgment thereon, and be adjudged to the successful party, whatever may be the result of the other issues raised.

General costs
of the cause,

The party who, in the general result of the action, is successful, is entitled to the *general costs of the cause*; ^q these are all the costs which have been necessarily incurred by the successful party to enable him to achieve that success; the costs of issues being the extra expense which the unsuccessful party has been put to in consequence of his opponent including in his declaration, or other pleading, claims, or defences, as the case may be, which he fails to make good.

and costs of
issues.

Example.

For example, suppose a case where the declaration consists of a count for goods sold, and a count on a bill of exchange—that to the first count the defendant pleads the *Statute of Limitations*, to the second *payment*,—at the trial, the verdict on the first issue is for the plaintiff with damages, on the second for the defendant. Here the plaintiff is entitled to the general costs, which are such as he would have incurred if his declaration had contained only the count for goods sold. Had that been so, he would have been entitled to the costs of his writ, of a declaration containing one count, of his replication to the plea of the Statute of Limitations, of an issue and record containing the pleading on the first count, of a brief, containing so much of the pleadings, statement, and evidence,

^p This, however, was not the prevailing practice until it was established by r. 74 of Reg. Hil.

Term, 2 Will. IV.

^q See 278, note A., *infra*.

as relates to the count for goods sold, and such fees as would have been paid to counsel on such a brief, the Court fees payable on such a record, and the costs of signing judgment and taxing his costs: so that the defendant will be charged with no more than he would have been if the plaintiff had confined his claim to the goods sold; but then the plaintiff, by setting up the claim on the bill on which he has failed, has caused the defendant to incur more expense in his defence than he would have incurred on the count for goods sold only. This excess of expense forms the *costs of the issue* found for the defendant. The appearance, it is obvious, is not caused by the plaintiff's second count, but the plea of payment is; the defendant must, therefore, be allowed the expense of that plea, of the extra length of the issue, of the extra length of his brief caused by the pleadings, statement and evidence on the second issue; and if the matter in the brief respecting the second issue has been the cause of his giving larger fees to counsel than would have been given on a trial respecting the goods sold only, then the defendant is entitled to the excess, and to the expense of taxing his costs. Where this has been done, it will be seen that the defendant will stand in the same position as if the declaration had originally consisted of the first count only, and that position is what is to be looked to as the guide throughout.^r

In case there are issues in fact and law, the party who is successful on the whole record, and who is consequently entitled to the general costs of the cause, will not necessarily be entitled to the *general costs of the trial*. General costs
of trial.

The rule^s now is, that "when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment thereon; and if the party entitled to the general costs of the cause obtain a verdict on any *material issue*, he will be entitled to the general costs of the trial; but if no material issue in fact

^r Taken from Gray on Costs, p. 36.

^s Reg. Hilary Term, 1853, r. 62, *infra*.

be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party."

Plaintiffs deprived of costs in trifling actions.

The costs of the cause frequently amount to very large sums of money, far exceeding the claim for which the action is brought; consequently, in order to discourage the bringing of trifling and vexatious actions, several statutes have at different times been passed, depriving the plaintiff of his costs in certain cases.

43 Eliz. c. 6, s. 2.

The 43 Eliz. c. 6, s. 2, enacts, that if in any personal action, not being for any title or interest in lands, nor concerning the freehold or inheritance of lands, nor for any battery, it shall *appear to the judges* for the same Court, and *so signified* by the justices before whom the same shall be tried, that the debt or damages *to be recovered*^t therein shall not amount to 40s., the judge shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered, but less at their discretion. And it was further provided by the 21 Jac. I. c. 16, that in all actions for *slandorous words*,^u if the plaintiff recovered^v less than 40s., he should recover only so much costs as the damages, without any further increase.

Damages under 40s.

8 & 9 Will. III. c. 11, malicious trespass.

However, by the 8 & 9 Will. III. c. 11, s. 4, the plaintiff was given his full costs of suit in all actions of trespass, if the judge certified on the record that the trespass was *wilful* and *malicious*; and by the 3 & 4 Vict. c. 24, the Statute of Elizabeth, so far as it relates to actions of trespass and trespass on the case, was repealed, and as to these it was enacted that if the plaintiff recovered by a *verdict of a jury* less than 40s., he shall have no costs whatever, whether it be upon issue tried, or upon judg-

3 & 4 Vict. c. 24, trespass and case.

^t This means the sum which the plaintiff succeeds in obtaining by bringing his action, and consequently includes the case of money paid into Court. *Richards v. Bluck*, C. B. 443.

^u This only extends to actions for words slanderous *per se*, and not to cases where the slander depends upon the profession or other position of the plaintiff.

^v See p. 278, note B., *infra*.

ment by default, unless the judge immediately afterwards certify on the record, or writ of trial, or writ of inquiry, that the action was brought to *try a right*,^x besides the mere right to recover damages, or that the trespass or grievance was *wilful and malicious*;^y the third section, however, provides that the act shall not deprive the plaintiff of his costs in actions of trespass *quare clausum fregit*, for trespasses in respect of which a notice not to trespass had been previously served upon or left at the residence of the defendant.

Action to try a right, or the wrong wilful and malicious.

In the words of Mr. Gray,^z the law as to verdicts under 40s. may be said to stand thus. In actions for *slandorous words*, if the plaintiff recover less than 40s., he can have no more costs than the damages, and the judge has no power to certify to give him costs.^a In other actions on the case, and in trespass, if the plaintiff recover less than 40s., he can have no costs whatever, unless the judge certify^b that the action was brought to try a right, besides the mere right to recover damages, or that the trespass or grievance was wilful and malicious, or unless it be suggested on the roll that the action was for a trespass to lands, &c., after notice. In other personal actions, if

Summary of law where verdict under 40s.

^x As these acts are only intended to discourage frivolous and vexatious actions, this exception is taken to include cases in which it appears to the judge that the plaintiff intended to try a right, or in which it was quite possible from the nature of the case that the defence might have been made upon a point of right. See *Shuttleworth v. Cocker*, 1 M. & G. 829; and Gray, 114.

^y With regard to the terms wilful and malicious, it must be observed, that as applied to *trespass* it is not *necessary* there should have been personal malice; in the case of a violent and unauthorized

act the judge may certify that it was wilful and malicious; in cases of libel, however, there must be *personal ill feeling* or *malice in fact*, as distinguished from that *malice in law* which is necessary to support the action. See Gray, 118.

^z Page 108.

^a 21 Jac. I. c. 16; *Turner v. Horton*, Willes, 438; 1 Dowl. 409. This act does not include words actionable by reason only of special damages. 2 Lord Raym. 831; 1 Salk. 206. Nor to slander of title; nor to libel. These actions are *actions on the case* within 3 & 4 Vict. c. 24.

^b Under 3 & 4 Vict. c. 24.

the plaintiff recover less than 40s., unless the case comes within the provisions of the County Court Acts,^c he will be entitled to his costs, unless the judge certify under the Statute of Elizabeth to deprive him of them.

Entry of suggestion.

It may be here observed that if any statute provides generally as to costs, and exceptions are made in particular cases, either by the same or another statute, the facts making the exception must in general appear on the face of the record, in order to enable the party for whose advantage the exception is made to claim the benefit of it. When these facts do not appear by the pleadings, or by a certificate of a judge, a *suggestion* of them must be entered on the record. If the suggestion is to be entered by the party not in possession of the *postea*, he may obtain a rule calling upon his opponent to show cause why the record should not be made up and taken into Court, in order that the suggestion may be entered. The suggestion, when entered, may be pleaded to, or demurred to, and the issues raised thereon determined in the ordinary way, and judgment given accordingly.

How far costs affected by County Courts Acts.

Besides the above statutes, which have for their object the discouragement of trifling and vexatious actions, other statutes have been passed with a view of confining actions below a certain amount to less expensive tribunals.

13 & 14 Vict. c. 61.

By the 13 & 14 Vict. c. 61, s. 11,^d if in any action of *covenant*, *debt*, *detinue* or *assumpsit*, not being for breach of promise of marriage, the plaintiff recover a *sum not exceeding 20l.*, or in any action of *trespass*, *trover* or *case*, not being for malicious prosecution, libel, slander, crim.

20l. and under.

con. or seduction, a *sum not exceeding 5l.*,^e the plaintiff

5l. and under.

^c *Vide infra.*

^d One of the County Court Acts.

^e In the original Act, 9 & 10 Vict. c. 95, s. 129, these sums were to be *less than 20l.* and *5l.* respectively. The latter part of this section, which is still unrepealed,

enacts, that if in an action in a Superior Court, which might have been brought in the County Court, and in which concurrent jurisdiction is not given (see s. 128, p. 271, *infra*), a verdict shall not be found for the plaintiff, the defendant shall

shall have no costs, except in the cases hereafter mentioned, and except in the case of judgment by default;^f and no suggestion need be entered,^g and the plaintiff shall not have costs by reason of any privilege as an officer of the Court or otherwise.^h

And by sect. 12, if the plaintiff recover by verdict a less sum than will carry costsⁱ in any such action, and the judge or presiding officer certify on the record that it appeared to him at the trial, either that the *action* was one for which a *plaint* could not have been entered in the *County Court*, or that there was sufficient reason for bringing the action in the Superior Court, the plaintiff shall recover his costs.

Judge's power to certify.

By 15 & 16 Vict. c. 54, s. 4,^k in any action in which the plaintiff is deprived of costs by the act of 13 & 14 Vict., whether there be a *verdict or not*, if the plaintiff shall make it appear to the satisfaction of the Court, or a judge at chambers, that such action was brought for a cause in which *concurrent jurisdiction* is given to the Superior Courts by s. 128 of 9 & 10 Vict. c. 95 (original County Court Act), or for which *no plaint* could have been entered in the *County Court*, or that the action was removed from a County Court by *certiorari*, or that there was *sufficient reason* for bringing the action in the Superior Court, the Court or judge shall, by rule or order, direct that the plaintiff shall recover his costs.

15 & 16 Vict. c. 54, rule or order to give costs.

And now by 19 & 20 Vict. c. 108, s. 30, when an *action of contract* is brought in one of the Superior Courts to recover a sum not exceeding 20*l.*, and there is *judgment by default*, the plaintiff shall recover no costs, unless upon application the Court or a judge shall *otherwise direct*.

Judgment by default, 19 & 20 Vict. c. 108.

have his costs as between attorney and client, unless the judge certify that the action was fit to be brought in such Court.

^f See now 19 & 20 Vict. c. 108, s. 30, as to *judgment by default* in actions of *contract*, *infra*.

^g See "Suggestion," p. 268, *supra*; and *Brooker v. Cooper*, 3 Exch. 112.

^h *Lewis v. Hance*, 11 Q. B. 921.

ⁱ *Garby v. Harris*, 7 Exch. 591.

^k Repealing 13 & 14 Vict. c. 61, s. 13.

It becomes necessary now to consider in what cases a plaint cannot be entered in the County Court, and also how far concurrent jurisdiction is given to the Superior Courts by s. 128 of the 9 & 10 Vict. c. 95.

Jurisdiction of
County Courts.

All personal
actions for 50*l.*
and under.

Exceptions.

19 & 20 Vict.
c. 108, s. 24.

In the first place, by virtue of the 9 & 10 Vict. c. 95, the whole of England and Wales, except the city of London,¹ was divided into districts, and County Courts were established in each, and by the above act, s. 58, as extended by the 13 & 14 Vict. c. 61, s. 1, jurisdiction was given to these Courts in all personal actions where the debt or damage claimed does not exceed 50*l.*, whether on balance of account or otherwise, provided that they should not have cognizance of ejectment, or any action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation, under any will or settlement, may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or for breach of promise of marriage.^m

And by the 19 & 20 Vict. c. 108, s. 24, jurisdiction is given to the County Court in actions where the debt or demand consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff; and by sect. 23, also in every action whatsoever, except for criminal conversation, in which the parties have agreed in writing, signed by them or their attornies, that a certain County Court shall have power to try it. It is, however, by the same act enacted, that no action shall be brought in the County Court upon a judgment of a Superior

¹ See City of London Small Debts Act, p. 272, *infra*.

^m And sect. 59 of the original act, the summons may issue in any district in which the defendant or one of the defendants *dwells* or *carries on his business* at time of

action brought; or by *leave of the Court* for the district in which the defendant *has dwelt* or carried on his business *within six months* before action, or in which the *cause of action* arose, the summons may issue in such Court.

Court.ⁿ It may be observed that corporations may be sued in the County Court.^o

With regard to the concurrent jurisdiction given to the Superior Courts under sect. 128 of 9 & 10 Vict. c. 95, that section enacts to this effect, that all actions and proceedings, where the plaintiff dwells more than twenty miles from the defendant,^p or where the cause of action did not arise wholly, or in some material point,^q within the jurisdiction of the Court within which the defendant dwells or carries on his business^r at the time of action brought, or where any officer of the County Court is a party (except in respect of goods and chattels taken in execution of the process of the Court, or the proceeds or value

Concurrent jurisdiction of Superior Courts under 9 & 10 Vict. c. 95, s. 128.

ⁿ Thus abrogating the decision of *Winsor v. Dunford*, 12 Q. B. 603.

^o *Taylor v. Crowland Gas and Coke Company*, 24 Law J., Exch. 233.

^p That is, from where the defendant dwells. *Paterson v. Davis*, 6 C. E. 235. Where the plaintiff has more than one residence, and one is beyond the twenty miles, there is concurrent jurisdiction. *Macdougall v. Paterson*, 21 Law J., C. P. 27. So also where one of several plaintiffs resides beyond the twenty miles.

The twenty miles is not to be measured along the road. *Stokes v. Grissell*, 23 L. J., C. P. 141; *Lake v. Butler*, 24 L. J., Q. B. 273. According to these cases, it should be measured as the crow flies. It is however submitted, that the proper line is neither as the crow flies nor a horizontal line from the perpendicular of one place to the perpendicular of the other, but a *straight line from point to point*, measured geometrically.

^q If, therefore, a *material point* in the cause of action arose within the jurisdiction within which the defendant *resides* or *carries on his business*, there is no concurrent jurisdiction. The entering into a contract at one place is a *material point*, though it be executed in another. *Norman v. Marchant*, 21 L. J., Exch. (N.S.) 256. So also the *acceptance* of a bill in action by drawer against acceptor. *Roff v. Miller*, 19 L. J., C. P. (N.S.) 278; and so are the *indorsement* and *notice of dishonour* in actions by indorsee against indorser. *Heath v. Long*, 1 L. M. & P. 333; 19 L. J., Q. B. 325. See *Buckley v. Hann*, 5 Exch. 43; *Kemp v. Clark*, 12 Q. B. 647; and see Gray on Costs, 154.

^r Unless all the defendants dwell or carry on business within the district, there is concurrent jurisdiction. *Doyle v. Lawrence*, 2 L. M. & P. 368. The defendant must have a fixed place of business. *Rolfe v. Learmouth*, 14 Q. B. 196. See Gray, 156.

thereof), may be brought in the Superior Court as if that act had not passed.

City of London
Act.

The ordinary County Court Acts do not extend to the city of London, but here the Sheriffs' Court takes the place of the County Court, and its jurisdiction is regulated by the 15 Vict. c. 77 (local and personal), the provisions of which, although analogous to, are in some respects different from those of the County Court Acts.

Sect. 2 gives the Sheriffs' Court the same jurisdiction as the County Courts.^s

By sect. 119, if an action which might have been brought in this Court is brought in a Superior Court, and a verdict is found for the plaintiff for a sum *not more than 50l.* in an action of contract, or *less than 5l.* in an action of tort, the plaintiff shall have no costs,^t and if a verdict be not found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge certify on the record that the action was fit to be brought in such Court.

50l. and under.

By sect. 120, if in any action in the Superior Courts in covenant, debt, detinue or assumpsit, not being for breach of promise of marriage, the plaintiff recover a sum *less than 20l.*, or in an action of *trespass, trover, or case*, not being for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, a sum *less than 5l.*, the plaintiff shall have no costs except in the cases hereafter mentioned, and except in case of judgment by default,^u and no suggestion need be entered to deprive the plaintiff of costs, nor shall any plaintiff be entitled to costs by reason of his being an attorney or officer of the Court or otherwise.

Under 20l.

Under 5l.

Judge's power
to certify, &c.

By sect. 121, the same provision is made as that contained in the 13 & 14 Vict. c. 61, s. 12.^x

By sect. 122, it is enacted that if in any such action,

^s See p. 270, *supra*.

^t As to the entry of a suggestion, see next page.

^u See as to this, 19 & 20 Vict. c. 108, s. 30, p. 269, *supra*.

^x See p. 269, *supra*.

whether there be a verdict or not, the plaintiff shall make it appear to the Court or a judge that the Superior Court has *concurrent jurisdiction* under that act, or that a *plaint* could *not*^x have been entered in the *Sheriffs' Court*, or that the cause was removed by *certiorari*, the plaintiff may have a rule or order for his costs.

The difference, then, between the provisions of the City of London Small Debts Act and the County Court Acts is this :—

Difference between County Court Acts and the London Act.

In actions which are brought in a Superior Court, and which might have been brought in the Sheriffs' Court of London, if the plaintiff, except in the excepted cases, recover *less than 50l.*, and not *less than 20l.* in an action of contract, he has no costs, unless the judge certify; but the defendant must enter a suggestion to deprive him of them: if he recover *less than 20l.* in an action of contract, or less than *5l.* in an action of tort, he has no costs, unless the judge certify, and no suggestion is necessary to deprive him of them. In actions which might have been brought in the County Court, the plaintiff, if he recover *not more than 20l.* in actions of contract, or *not more than 5l.* in actions of tort, has no costs, unless the judge certify, and no suggestion is necessary.^y

Independently of the above provisions, if a plaintiff sue for a debt under 40s., which he might recover in an inferior Court, proceedings will, in general, be stayed without costs, although, where the defendant admits the debt, this will be done only on payment of the debt; indeed, the Courts will stay proceedings upon payment of the debt without costs, even where the debt exceeds 40s.,

Staying proceedings where debt under 40s.

^x The *plaint* may be entered under similar conditions to those already mentioned respecting the County Courts, with this addition, that the defendant may be sued in this Court if he *has employment* within the city. Sect. 39.

plaintiff may apply to the Court or a judge afterwards for his costs; but the power given in such case to the Court or judge is greater under the County Court Acts than the London Act. See pp. 269, 272, *supra*.

^y In both the above cases the

if it is quite clear that it might have been recovered in an inferior Court.^z The plaintiff cannot escape from this rule by including in his claim a fictitious item.^a

Actions on judgments.

By the 43 Geo. III. c. 46, the plaintiff is deprived of his costs in actions on judgments, unless the Court or a judge at chambers otherwise order. To obtain such order, the plaintiff must show a good reason for bringing the action, instead of proceeding in the usual way to execution; for example, where the plaintiff had brought an action for 15*l.*, and the defendant suffered judgment by default, and was found to have no effects, and the plaintiff, in order to obtain a *ca. sa.* against him, then brought an action on the judgment, which, (being for the costs as well as the debt,) exceeded 20*l.*, and the defendant pleaded a false plea of *nul tiel record*, the Court directed the plaintiff to recover his costs.

Amount of costs.

The statutes entitling the parties to costs are imperative upon the Courts only as to the *right* to costs; the *quantum* is, in all cases, left to the discretion of the Court. The Statute of Gloucester makes the costs parcel of the *damages*, the quantum of which the Courts have a right, as against the defendant, to assess;^b and, by the other statutes, the amount is left expressly in the discretion of the Court.

Taxation of costs.

The amount of costs, as already stated, the Courts assess through the medium of their officers, who are appointed to tax the costs. These officers are governed in their taxation by the statutes and rules of Court relating thereto, and also by certain *directions* issued for their guidance by the Courts. The Courts allow a very large discretion to the taxing officers, although where it can be clearly shown that they have proceeded upon erroneous principles, the Courts will order them to review their taxation.

^z *Cornforth v. Lowcock*, 1 M. & Ry. 321. See 5 Exch. 738.

^a *Thompson v. Gill*, 6 Dowl. 155.

^b 2 Wms. Saund. 107, note 2; *Hewit v. Mantel*, 2 Wils. 372; 3 Wils. 62, per Wilmot, C. J.

In taxing the costs of the pleadings and other proceedings that appear either by the record or by some other authentic document, such, for example, as an order of a judge, the record or document will be sufficient guide as to the amount, but the amount of the costs of the trial, such as of the counsel, witnesses, evidence, &c., must be shown by affidavit,^c which is called the *affidavit of increase*. Affidavit of increase.

There are three principal rates upon which the general taxation of costs between the parties proceeds, first, simply as between *party and party*, secondly, as between *attorney and client*, and thirdly, according to the lower or *reduced scale*.

In the taxation of costs as between party and party the costs of all regular and *necessary* proceedings will be allowed, and also of all incidental expenses that have been ordered to be costs in the cause. The costs also of interlocutory proceedings, not otherwise provided for, will, in general, be costs in the cause.^d The plaintiff will be allowed the costs of *one* letter from his attorney to the defendant applying for payment.^e Costs as between party and party.

The principle of the taxation of the costs as between attorney and client is, that the successful party shall be entirely free from what are called *extra costs*, these, however, by no means extend to all the expenses which the plaintiff may, practically, have *necessarily* incurred, such as travelling expenses, preliminary searches, and cases for opinion of counsel, before bringing the action, or other expenses not strictly incurred, in proceeding in the action. As between attorney and client.

With regard to the reduced scale of costs, the *directions* issued to the taxing officers^f contain two scales of costs, a higher and a lower, and the officers are directed, that Upon the reduced scale, in actions for 20*l.* and under.

^c See Gray on Costs, 496.

^d Gray on Costs, 495.

^e *Capel v. Staines*, 2 M. & W. 850. But he will be allowed no

other preliminary expenses except a notice of action when necessary.

^f Hilary Term, 1853. See Appendix, Lush's Practice.

Lower scale.

in all actions in which the *trial* might have been had before the sheriff upon a *writ of trial*,^g the plaintiff's costs shall be taxed according to the lower scale, unless the judge certify on the *postea* that the cause is one proper to have been tried before him; and further, that in like actions, where the amount indorsed on the summons exceeds 20*l.*, but the plaintiff recovers no more, and the judge does not certify as above, the plaintiff's costs, against the defendant, whether as between party and party, or as between attorney and client, shall be taxed as upon a writ of trial before a Court of Record, where attorneys are not allowed to act as advocates; but the defendant's costs, if any, are to be taxed upon the higher scale: provided that in cases triable in the inferior Court, where the Judge refuses to make an order for such trial, he may direct at the time of such refusal on what scale the costs shall be taxed, and in default of such direction the costs of both shall be taxed on the higher scale.

Only where claim for sum certain.

The lower scale, therefore, applies only to actions in which the amount of the claim is *indorsed on the writ of summons*, and where it does not exceed 20*l.*; it applies, consequently, to no actions of *tort*, and only to those actions of *contract* in which the whole claim is for a certain or *liquidated sum*, and not where there is any claim for unliquidated damages.^h

Double and treble costs.

There are certain cases in which a party is entitled to additional costs under the name of double and treble costs. When any statute gives double or treble damagesⁱ to the plaintiff, he necessarily has double or treble costs, his *damages* being in fact so much for the damage he has sustained by reason of the wrong, and so much for the damage sustained by reason of the costs

^g By 3 & 4 Will. IV. c. 42, s. 17, see p. 154, *supra*. This includes all actions where the *debt* or *demand* indorsed on the *summons* does not exceed 20*l.*

^h *Jacquot v. Boura*, 5 M. & W. 155; see also 1 Dowl. N. S. 566; 3 M. & G. 850; 11 A. & E. 941; and Gray on Costs, 172.

ⁱ See 2 M. & W. 142; 5 Dowl. 313.

of the suit. Apart from this, many statutes expressly gave, in certain cases, double and treble costs, and costs as between attorney and client. All enactments, however, giving other than the usual costs, were repealed by the 5 & 6 Vict. c. 97, and for such costs were substituted, in cases where they were given by public, local and personal, and by local and personal acts, the usual costs as between party and party; and where by public acts, a *reasonable indemnity* for the expenses incurred, to be taxed by the officer.^k

Ejectment having been formerly a personal action, the plaintiff was entitled to his costs by the statute of Gloucester, although in practice, in consequence of the parties to the action being fictitious, this right was useless; the right of the real parties to their costs was always provided for in the consent rule.^l

At the present day the costs of the parties in ejectment are regulated by the Common Law Procedure Act, 1852, sects. 177—205, and Reg. Hilary Term, 1853, r. 114, and Reg. Trinity Term, 1853, r. 30. If, however, in this action the claimant obtain judgment for non-appearance, he has no judgment for costs, but, as observed by Mr. Gray, he must recover them in the action for mesne profits.

Costs are either interlocutory or final. Where they are adjudged by the final judgment in the cause, they are *final costs*. The costs of interlocutory proceedings tend-

Ejectment.

Interlocutory and final costs.

^k Subsequent statutes have, however, given in some cases double and treble costs, and in others, costs as between attorney and client; for example, by the County Courts Act, 9 & 10 Vict. c. 95, s. 129, and by the City of London Small Debts Act (see p. 272, *supra*), the defendant is entitled to costs as between attorney and client where the plaintiff fails

to get a verdict in actions which ought to have been brought in the inferior Court. A similar provision is contained in 11 & 12 Vict. c. 44, to protect justices from vexatious actions, and in the 15 & 16 Vict. c. 54, protecting persons acting in pursuance of the County Court Acts. See Gray, p. 185.

^l See p. 41, *supra*.

Mode of recovering costs.

ing to advance the cause, if before judgment an order is made for their payment, are called *interlocutory costs*.

With respect to the remedies for costs; in the first place, the plaintiff's final costs being part of the damages, he is entitled at common law to execution for them in the usual way. The statutes by which costs were given to the defendant, at the same time directed that he should have judgment for his costs, and that they should be assessed and levied by the same process as the plaintiff might have had.

When both parties are entitled to costs,^m each will have a judgment for them, and the lesser amount will be set off against the other, and the balance may be recovered in the ordinary way.

On rule or order.

In the case of a rule directing the payment of costs it may be enforced by attachment, or by execution, by virtue of the 1 & 2 Vict. c. 110, s. 18.ⁿ A judge's order for payment of costs can only be enforced by being made a rule of court. No action will lie upon it.^o

^m See "Costs of Issues," p. 263, *supra*.

ⁿ See p. 204, note (r).

^o See p. 38, *supra*.

NOTE A. to pp. 263, 264.—As a general rule, if the plaintiff succeeds on any part of the declaration, he is entitled to the *postea* and to the general judgment in the cause; but if any plea found for the defendant answers the whole declaration, then he is entitled to it; whoever has such judgment has the *general costs of the cause*.

NOTE B. to p. 266.—These Statutes are merely intended to discourage frivolous actions, therefore where the plaintiff *recovers nothing*, by reason of a plea which goes to the whole action being found for the defendant, he will not be deprived of his costs of issues found in his favour, although, if he *had recovered under 40s.*, he would have no costs. See *Gray*, p. 20; *Skinner v. Shoppee*, 6 Bing. N. C. 131.

CHAPTER XVIII.

REGULÆ GENERALES, HILARY TERM, 1853—THE
RULES OF PRACTICE.

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WHEREAS the practice of the Courts of Queen's Bench, Common Pleas and Exchequer, in civil actions in respect of which the said Courts possess a common jurisdiction, has been to a great extent superseded or altered by the Common Law Procedure Act, 1852, and it is expedient that the written rules of practice of the said Courts should be consolidated and rendered uniform: It is ordered, that all existing written Rules of Practice in any of the said Courts in regard to such civil

R. H. T. 1853.

R. H. T. 1853. — actions, save and except as regards any step or proceeding heretofore taken, shall be and the same are hereby annulled, and that the practice to be observed in the said Courts with respect to the matters hereafter mentioned, shall be as follows ; that is to say,

Writ of summons.

1. When a writ of summons is indorsed in the special form mentioned in sect. 27 of the Common Law Procedure Act, 1852, the following are the amounts which may be indorsed by the plaintiff's attorney or agent upon the writ of costs ; and to include mileage ;

In Actions above £20.

	£	s.	d.		£	s.	d.
In town causes ..	3	8	0	In country or agency cases (including mileage).	4	0	0

In Actions under £20.

	£	s.	d.		£	s.	d.
In town causes ..	2	14	0	In country or agency cases (including mileage).	3	2	0

Where the plaintiff's attorney, at the time of issuing the writ, claims more than the sums fixed as above, the indorsement on the writ of summons in respect of costs shall be as follows : "Such sum as shall be allowed on taxation for costs." And in case the plaintiff shall be found not entitled to more costs than such fixed sums, or if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. So if the attorney has indorsed on the writ one of the fixed sums for the costs of judgment, and claims more costs on signing judgment, and on taxation shall be found not entitled to more than such sum, or if more than one-sixth be taken off on taxation, the plaintiff's attorney shall in like manner pay the costs of taxation.

Appearance.

2. If two or more defendants in the same action shall appear by the same attorney and at the same time, the names of all the defendants so appearing shall be inserted in one appearance.

Attorney and guardian.

3. An attorney not entering an appearance in pursuance of his undertaking shall be liable to an attachment.

4. No attorney shall be changed without the order of a judge.

5. A special admission of prochein amy, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Joinder of parties.

6. Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a nonjoinder by virtue of the Common Law Procedure Act, 1852, sect. 36, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant,

unless the filing of such consent be dispensed with by order of the Court or judge. R. H. T. 1853.

7. No side bar rule for time to declare shall be granted. Pleadings.

8. The defendant shall not be at liberty to waive his plea, or enter a relictâ verificatione after a demurrer, without leave of the Court or a judge, unless by consent of the plaintiff or his attorney.

9. In case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October.

10. Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea. Plea of judgment recovered.

11. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of Court, unless specially required by the Master. Payment of money into Court.

12. When money is paid into Court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for Plea," but not before.

13. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to cost on the others up to the time of paying money into Court.

14. The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be Demurrer.

R. H. T. 1853. delivered separately or indorsed on the demurrer, otherwise judgment.

15. No motion or rule for a concilium shall be required ; but demurrers, as well as all special cases, special verdicts and appeals from County Courts, shall be set down for argument in the special paper at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party.

16. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior puisne judge of the Court in which the action is brought ; and the defendant shall deliver copies to the other two judges of the Court next in seniority ; and in default thereof by either party the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default ; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies. If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered, or on separate papers.

17. When there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates, shall be copied into the demurrer books ; and if any other parts shall be copied, the Master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client.

Venue, change of.

18. No venue shall be changed without a special order of the Court or a judge, unless by consent of the parties.

Particulars of demand or set-off.

19. With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the Common Law Procedure Act, 1852) delivered or filed, containing causes of action of such as those set forth in Schedule B. of that act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios ; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as

may be comprised within that number of folios; and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered, that if any such declaration shall be delivered or filed, on any plea of set-off delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand, and set-off shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer. R. H. T. 1853.

20. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

21. A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order.

22. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined. Security for costs.

23. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation defendant shall be at liberty to sign judgment of non pros. Discontinuance.

24. In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of debt and costs in that action only. Staying proceedings.

25. No judgment shall be signed upon any cognovit or any warrant of attorney, without such cognovit or warrant being delivered to and filed by the Master, who is hereby ordered to file the same in the order in which it is received. Cognovit, warrant of attorney, judge's order for judgment.

26. Leave to enter up judgment on a warrant of attorney above one and under ten years old is to be obtained by order of a judge made ex parte, and if ten years old or more upon a summons to show cause.

27. Every attorney, or other person, who shall prepare any warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made

R. H. T. 1853. on such warrant, containing the substance and effect of such defeasance.

Costs of judge's order. 28. The costs of filing a judge's order for judgment against a trader defendant under the Bankrupt Act shall not be allowed unless specially ordered by the Judge.

Evidence. 29. The form of notice to admit documents referred to in the Common Law Procedure Act, 1852, section 117, may be as follows :—

In the Q. B. [C. P., } A. B. v. C. D.
or " Exchequer"].

Take notice, that the plaintiff [*or* " defendant"] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* " plaintiff"], his attorney or agent, at — on — between the hours of — ; and the defendant [*or* " plaintiff"] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H., Attorney
[*or* " Agent"] for Plaintiff [*or* " Defendant."]

[*Here describe the documents, the manner of doing which may be as follows :—*

ORIGINALS.

Description of the Documents.	Dates.
Deed of Covenant between A. B. and C. D., 1st part ; and E. F. 2nd part.	1st January, 1848.
Indenture of Lease from A. B. to C. D.....	1st February, 1848.
Indenture of Release between A. B., C. D., 1st part, &c.	2nd February, 1848.
Letter, Defendant to Plaintiff.....	1st March, 1848.
Policy of Insurance on Goods by Ship Isa- bella on Voyage from Oporto to London.	3rd December, 1847.
Memorandum of Agreement between C. D., Captain of said Ship, and E. F.	1st January, 1848.
Bill of Exchange for 100 <i>l.</i> at Three Months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	1st May, 1849.

COPIES.

R. H. T. 1853.

Description of Documents.	Dates.	Original or Duplicate served, sent or delivered, when, how and by whom.
Register of Baptism of A. B. in the Parish of X.	1st January, 1808.	
Letter, Plaintiff to Defendant.	1st February, 1842.	Sent by General Post, 2nd Feb. 1848.
Notice to produce Papers..	1st March, 1848 ..	Served 2nd March, 1848, on Defendant's Attorney, by E. F. of —.
Record of a Judgment of the Court of Queen's Bench in an Action, J. S. v. J. N.	Trin. Term, 10 Vict.	
Letters-patent of King Charles II. in the Rolls Chapel.	1st January, 1680.	

30. In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by and subject to the provisions of the Common Law Procedure Act, 1852; and in case of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or inquisition, the judge or presiding officer shall certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of Master, a saving of expense.

Costs of proving documents.

31. An order upon the lord of a manor, to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.

Order to inspect court roll.

32. No subpoena for the production of an original record shall be issued, unless a rule of court or the order of a judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order.

Subpoena for original record.

33. All depositions of witnesses taken under the order of a judge, rule of court, or writ of commission, shall be returned

Filing depositions.

R. H. T. 1853. to and filed in the office of the Masters of the Court in which the action or proceeding is pending.

Notice of trial,
&c.

34. Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge.

35. The expression "Short notice of trial," or "Short notice of inquiry," shall in all cases be taken to mean four days.

36. Notice of trial or inquiry may be continued to any sitting in or after term, on giving a notice of continuance four days before the time mentioned in the notice of trial or inquiry, unless short notice of trial or inquiry has been given, in which cases two days previous notice shall be sufficient, unless otherwise ordered by the Court, or a judge, or by consent.

37. Countermand of notice of inquiry shall be given four days before day of inquiry mentioned in the notice, unless short notice of inquiry has been given, and then two days before such day, unless otherwise ordered by the Court or a judge, or by consent.

On nul tiel
record.

38. On a replication or other pleading, denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof, a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment.

39. The costs of the day for not proceeding to trial, or to execute a writ of inquiry, may be obtained by a side-bar rule, on the usual affidavit.

40. In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer: and in case the defendant pleads a plea in bar or rejoinder, &c. to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person,

shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer. R. H. T. 1853.

41. Notice of a trial at bar shall be given to the Masters of the Court before giving notice of trial to the party.

42. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

43. All causes to be entered for trial in London and Middlesex shall be entered as follows; that is to say, if notice of trial shall be given for any sitting within term, two days before the day of sitting; and if for a sitting after term, before eight o'clock, p. m., of the day before the first day of such sitting, and if the same shall not be so entered for such sitting respectively a *ne recipiatur* may be entered.

44. No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case, no such rule is to be granted unless such application is made for it more than six days before that day; provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time. Jury and view.

45. No cause shall be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the Associate's book as a special jury cause, on or before the day preceding the day appointed in Middlesex and London respectively for the trial of special juries.

46. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge, upon summons for that purpose.

47. Sheriffs, other than the sheriffs of London and Middlesex, shall, seven days before the commission day, make and keep at their offices, for inspection, a printed copy of the panel of the special jurymen to try the special jury causes at the assizes, as directed by the Common Law Procedure Act, 1852; but such special jury need not be summoned, except notice be given as provided for by the 112th section of the said act.

48. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without a motion for that purpose.

49. Upon any application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff, and the sum to be deposited in the hands of the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a

R. H. T. 1853. special jury, if such distance do not exceed five miles ; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view ; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff. And the under-sheriff shall pay and account for the money so deposited according to the scale following ; (that is to say,)

	£	s.	d.
For travelling expenses to the under-sheriff, showers and jury-men, expenses actually paid, <i>if reasonable</i> .			
Fee to the under-sheriff, when the distance does not exceed five miles from his office.....	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of	1	1	0
Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each common jurymen, per diem	0	5	0
For each special jurymen, per diem	1	1	0
Allowance for refreshment to the under-sheriff, showers and jurymen, whether common or special, each, per diem	0	5	0
To the bailiff for summoning each jurymen whose residence is not more than five miles distant from the office of the under-sheriff	0	2	6
And to each whose residence does exceed five miles of such distance	0	5	0

Motions for
new trials, &c.

50. No motion for a new trial, or to enter a verdict or non-suit, motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the Court.

51. No suitor who appears in person shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the Court.

52. No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making such motion, without the special permission of the Court for that purpose.

53. If such motion as above mentioned be entered in such list of proposed motions, or if such motion be postponed by leave of the Court in the case of a cause tried in term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall

be deemed regular, and every suitor who appears in person shall give a similar notice. R. H. T. 1853.

54. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

55. No rule for judgment shall be necessary; and after the return of a writ of inquiry judgment may be signed at the expiration of four days from such return. Judgment.

56. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court or a judge to order a judgment to be entered nunc pro tunc.

57. When a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the judge who tries the cause, or some other judge, or the Court, shall order execution to issue at an earlier or later period, with or without terms.

58. Where issue shall be joined in any cause which is ordered to be tried before the sheriff or a judge of an inferior Court of Record, the defendant may at the time when, according to the 101st section of the Common Law Procedure Act, 1852, a defendant might give notice to the plaintiff to bring on an issue to be tried, give twenty days' notice to the plaintiff to bring on the issue to be tried before such sheriff or judge at the Court to be holden next after the expiration of such twenty days; and if the plaintiff neglects to give notice of trial before such sheriff or judge, or to proceed to trial in pursuance thereof, the defendant may proceed as provided for by the said 101st section. Defendant taking cause to trial in inferior Court.

59. One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the attorney of the party whose costs are to be taxed to the other party, or his attorney, in all cases where a notice to tax is necessary. Costs.

60. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill.

61. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian.

62. When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to

R. H. T. 1853. the general costs of the cause, the costs of the trial shall be allowed to the opposite party.

63. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

Error.

64. Within eight days after the filing with the Master of the memorandum of error in fact, required by the Common Law Procedure Act, 1852, the plaintiff in error shall assign error; and in default, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

65. No rule to plead to assignment of error in fact, or any other pleadings in error, shall be necessary, but either party may give to the opposite party a notice to answer such pleading within four days, otherwise judgment; which notice may be delivered separately, or indorsed on the pleading.

66. Notice of trial and all other proceedings thereon, shall be the same as in issues joined in an ordinary action.

67. After the suggestion of error in law, alleged and denied as prescribed by the Common Law Procedure Act, 1852, is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof as on a demurrer, without any rule or motion for a concilium.

68. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment roll of the Court below, to the judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the judges of the Common Pleas on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Court of Exchequer Chamber before whom the cases is to be heard; and in default by either party, the other party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies.

69. The costs of proceedings in error shall be taxed and allowed as costs in the cause.

Execution.

70. It shall not be necessary, before issuing execution upon any judgment whatever, to enter the proceedings upon any roll.

71. No writ of execution shall be issued till the judgment paper, postea, or inquisition, as the case may be, has been seen by the proper officer, nor shall any writ of execution be issued without a præcipe being filed with the proper officer.

72. Every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the

name of the Lord Chief Justice or of the Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office then in the name of the senior puisne judge of the said Court and may be made returnable on a day certain in term. R. H. T. 1853.

73. Every writ of execution shall be indorsed with the name and place of abode or office of business of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode or office of business of the attorney of such Court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or parish, and also the name of the hamlet, street and number of the house of such plaintiff's or defendant's residence, if any such there be.

74. Writs of *capias ad satisfaciendum* for the purposes of outlawry on final process, or to fix bail,^a must be made returnable on a certain day in term, and may be so returnable on any day in term, and it shall be sufficient for either purpose that there be eight days between the teste and return.

75. A writ of *capias ad satisfaciendum* to fix bail shall have eight days between the teste and return, and must, in London and Middlesex, be entered four clear days in the public book at the sheriff's office.

76. Every writ of execution shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day; provided that in cases where there is an agreement between the parties that more than four per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

77. In cases of an assessment of further damages, pursuant to the statute of 8 & 9 William III., it shall be stated in the body of the writ of execution that the sheriff, or other officer

^a This is repealed by sect. 90 of the Common Law Procedure Act, 1854, which enacts that the *ca. sa.* to fix bail may be returnable in vacation.

R. H. T. 1853. — or person to whom the writ is directed, is to levy interest on the damages assessed, and costs taxed on that behalf, at the rate of four pounds per centum per annum from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day.

Revivor. 78. A plaintiff shall not be allowed a rule to quash his own writ of scire facias or revivor, after a defendant has appeared, except on payment of costs.

Auditâ querelâ. 79. No writ of auditâ querelâ shall be allowed unless by rule of court or order of a judge.

Entry of satisfaction on roll. 80. In order to acknowledge satisfaction of a judgment it shall be requisite only to produce a satisfaction piece, in form as hereinafter mentioned; and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which attorney shall declare himself in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; [provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he think fit,] and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Master may direct.

FORM OF SATISFACTION PIECE.

In the —.

Monday, the — day of —, A.D. 185—.

— to wit.—Satisfaction is acknowledged between — plaintiff and — defendant, in an action — for — and —: And — do hereby expressly nominate and appoint —, attorney at law, to witness and attest — execution of this acknowledgment of satisfaction.

Judgment entered on the — day of —, in the year of our Lord 185—. Roll No. —.

Signed by the said — in the presence of me — of —, one of the attornies of the Court of — at Westminster. And I hereby declare myself to be attorney for and on behalf of the said — expressly named by h — and attending at h — request to inform h — of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h —). And I also declare that I subscribe my name hereto as such attorney.

(Signature.)

(Date.)

} the above-named plaintiff.

81. The sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at least after the execution thereof, indorse on such writ the true day of the execution thereof. R. H. T. 1853.

82. Where the defendant is described, in the writ of *capias* or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. Bail.

83. An action may be brought upon a bail-bond by the sheriff himself in any Court.

84. In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

85. Proceedings on bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

86. When bail to the sheriff becomes bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.

87. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

88. No rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded on an affidavit, showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

89. Whenever a plaintiff shall rule the sheriff on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff, having so ruled the sheriff, shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.

90. In case a rule for returning a writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a rule may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such rule

R. H. T. 1853. as by the practice of the Court is prescribed with respect to
Bail. — rules to bring in the body, issued in term, to bring in the
defendant into Court, by forthwith putting in and perfecting
bail above to the action; and if the sheriff or other officer
shall not duly obey such rule, an attachment shall issue in the
following term for disobedience of such rule, whether the bail
shall or shall not have been put in and perfected in the mean-
time.

91. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a judge.

92. The bail, of whom notice shall be given, shall not be changed without leave of the Court or a judge.

93. No person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants.

94. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be put in in the meantime.

95. In the case of country bail, the bail-piece shall be transmitted and filed within eight days.

96. A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid, to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then (unless the Court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

97. Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

98. If the notice of bail shall be accompanied by an affidavit of each of the bail according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such

bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a judge thereof shall otherwise order. R. H. T. 1853. — Bail.

Form of Affidavit of Justification of Bail.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be].

Between A. B. plaintiff, and C. D. defendant.

B. B., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [or "freeholder," as the case may be] residing at — [describing particularly the street or place and number if any]; that he is worth property to the amount of £ — [the amount required by the practice of the Courts] over and above what will pay all his just debts [if bail in any other action add "and every other sum for which he is now bail"]; that he is not bail for any defendant except in this action [or if bail in any other action or actions add "except for C. D. at the suit of E. F. in the Court of —, in the sum of £ —; for G. H. at the suit of I. K. in the Court of —, in the sum of £ —," specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail]; that the deponent's property, to the amount of the said sum of £ —, [if bail in any other action or actions here add "and of all other sums for which he is now bail as aforesaid,"] consists of [here specify the nature and value of the property in respect of which the bail proposes to justify as follows: "stock in trade, in his business of —, carried on by him at —, of the value of £ —; of good book debts owing to him to the amount of £ —; of furniture in his house at —, of the value of £ —; of a freehold or leasehold farm of the value of £ —, situate at —, occupied by —, or of a dwelling-house of the value of £ —, situate at —, occupied by —;" or of other property, particularizing each description of property with the value thereof], and that the deponent hath for the last six months resided at —, [describing the place or places of such residence].

Sworn [&c. as usual].

99. If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

100. Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may except thereto within twenty days next after the putting in of such bail and notice thereof, given in writing to the plaintiff or his attorney, or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the bail-piece is transmitted, and notice thereof given as aforesaid; and no exception to bail shall be admitted after the time hereinbefore limited.

101. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1,000*l.*, when it shall be sufficient for the bail to justify in 1,000*l.* beyond the sums sworn to.

R. H. T. 1853.

Bail.

102. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

103. In all cases bail either to the action or in error shall be justified, when required, within four days after exception, before a judge at chambers, both in term and vacation.

104. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

105. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

106. On the application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any exoneretur.

107. If a defendant shall be in custody of the gaoler of any county gaol by virtue of any process issued out of any of the said Courts, he may be rendered in discharge of his bail in any action depending in the said Court in like manner as is last hereinbefore provided, and thereupon the bail shall be wholly exonerated, without entering any exoneretur.

108. Where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

109. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

110. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

111. Whenever two or more notices of justification of bail shall have been given, before the notice on which bail shall

appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent), the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected. R. H. T. 1853.

112. No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act, 1852, and a copy thereof or, where personal service has not been effected, without first obtaining a judge's order, or a rule of Court authorizing the signing such judgment; which said rule or order, or a duplicate thereof, shall be filed together with a copy of the writ. Ejectment.

113. Where a person not named in the writ in ejectment has obtained leave of the Court or a judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff, if he sues in person.

114. If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff, without producing any evidence, and the plaintiff shall have judgment for his costs of suit as in other cases.

115. Rules to appear in causes removed from inferior Courts shall in all cases be a four day rule, both in term and vacation. Causes removed from inferior Courts.

116. In cases of removal of causes from inferior Courts by habeas corpus, where bail is required to be put in on behalf of the defendant, the same practice shall be used, as near as may be, as in putting in bail to an ordinary action, and in the event of no bail being put in within eight days after the habeas corpus allowed a procedendo may issue.

117. If a cause be removed from an inferior Court having jurisdiction of the cause, the costs in the Court below shall be costs in the cause.

118. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer; but in other cases it may. Penal actions, compounding of.

119. The rule for compounding any qui tam action, shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action.

R. H. T. 1853.

Paupers, ac-
tions by.

120. When leave is given by the Court of Queen's Bench to compound a penal action, the Queen's half of the composition shall be paid into the hands of the Master of the Crown Office for the use of her Majesty.

121. No person shall be admitted to sue in formâ pauperis, unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney that the same case contains a full and true statement of all the material facts, to the best of his knowledge and belief, shall be produced before the Court or judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the office of the masters, or associates, or at the judge's chambers, or elsewhere, by reason of a verdict being found for such pauper exceeding five pounds.

122. Where a pauper omits to proceed to trial, pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid.

Prisoners and
proceedings
against.

123. Every rule or order of a judge, directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a supersedeas to issue forthwith, where defendant is in a county gaol.

124. The plaintiff shall proceed to trial, or final judgment, against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the Court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment.

125. The keeper of the Queen's Prison shall present to the judges of the Courts in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, showing as to what actions and on what account they are so, and as to what actions (if any), they still remain not supersedeable.

126. If, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the keeper of the Queen's Prison be not entitled to a supersedeas or discharge for want of proceeding to trial or judgment, or charging in execution, within the times prescribed, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody shall with all convenient speed give notice in writing of such writ of error, special order, agreement, or other special matter, to the keeper, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the keeper shall forthwith, after the re-

ceipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the judges of the respective Courts, from time to time, a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable. R. H. T. 1853.

127. All prisoners who have been or shall be in the custody of the keeper for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the Queen's Prison as to all such actions in which they have been or shall be supersedeable.

128. After notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any act for the Relief of Insolvent Debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the Courts from the time of such notice given, until some rule or order shall be made in the cause in that behalf.

129. A rule or order for the discharge of a prisoner who has been detained in execution a year, for a sum under twenty pounds, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

130. All rules upon the sheriffs of London and Middlesex to return writs, or to bring in the bodies of defendants, shall be four-day rules, and upon other sheriffs eight-day rules.

Sheriffs—rules to return writs or bring in the body.

131. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open; and the officer with whom it is filed shall indorse the day and hour when it was filed.

132. No judge's order shall issue for the return of any writ, or to bring in the body of a defendant, but a side bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side bar rules made for that purpose in term.

133. In case a rule shall issue in vacation for the return of any writ of *capias*, *ca. sa.*, *fi. fa.*, *elegit*, *habere facias possessionem*, *venditioni exponas*, or other writ of execution, and such rule shall have been duly served, but obedience shall not have been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule shall or shall not have been done in the meantime.

134. Where any sheriff, before his going out of office, shall arrest any defendant, and take a bail bond and make return of *cepi corpus*, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that

R. H. T. 1853. purpose, notwithstanding he may be out of office before such rule shall be granted.

Irregularity.

135. No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

136. Where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon, shall be stated therein.

137. In all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally without any special direction upon the matter of costs, it is to be understood as discharged with costs.

Affidavits.^b

138. The addition and true place of abode of every person making an affidavit shall be inserted therein.

139. In every affidavit made by two or more deponents the names of the several persons making such affidavit shall be written in the jurat.

140. No affidavit shall be read or made use of in any matter depending in Court in the jurat of which there shall be any interlineation or erasure.

141. Where any affidavit is sworn before any judge or any commissioner by any person who from his or her signature appears to be illiterate, the judge's clerk or commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her mark or signature in the presence of the judge's clerk or commissioner taking the said affidavit.

142. No affidavit of the service of process shall be deemed sufficient if sworn before the plaintiff's own attorney or his clerk.

143. Where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

144. An affidavit sworn before a judge of any of the Courts shall be received in the Court to which such judge belongs though not entitled in that Court; but not in any other Court unless entitled of the Court in which it is to be used.

145. Where a special time is limited for filing affidavits no

^b See Reg. Michaelmas Vacation, 1854, r. 2, p. 312, *infra*.

affidavit filed after that time shall be made use of in Court or before the Master, unless by leave of a Court or a judge. R. H. T. 1853.

146. No rule which the Court has granted upon the foundation of any affidavit shall be of any force unless such affidavit shall have been actually made before such rule was moved for, and produced in Court at the time of making the motion.

147. All affidavits used before a judge out of Court shall be filed with the Master of the said Court, and be alphabetically indexed; and such affidavits shall be delivered to the Masters of the respective Courts, in order to be filed, ten days next after that on which the matter is disposed of.

148. No commission for taking affidavits shall be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at Westminster: and no such commission shall issue without an affidavit made by the person intended to be named therein, that he is not and does not intend to become a practising conveyancer, or that he is an attorney or solicitor duly inrolled in one of the said Courts, and hath taken out his certificate for the current year.

149. Every rule of Court shall be dated the day of the week, month and year on which the same is drawn up, without reference to any other time or date. Rules, summons and orders.

150. Side bar rules may be obtained on the last as well as on other days in term.

151. A rule may be enlarged, if the Court think fit, without notice.

152. All enlarged rules shall be drawn up for the first day in the ensuing term, unless otherwise ordered by the Court.

153. It shall not be necessary to issue more than one summons for attendance before a judge upon the same matter, and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary.

154. An attendance on a summons, or on an appointment before a master, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance.

155. All written consents upon which orders for signing judgments are obtained shall be preserved in the chambers of the judges of the respective Courts.

156. In actions where the defendant has appeared by attorney no such order shall be made unless the consent of the defendant be given by his attorney or agent.

157. Where the defendant has not appeared or has appeared in person, no such order shall be made unless the defendant attends the judge, and gives his consent in person, or unless his written consent be attested by an attorney acting on his

R. H. T. 1853. — behalf; except in a case where the defendant is a barrister, conveyancer, special pleader or attorney.

158. Where a judge's order is made during vacation, it shall not be made a rule of court before the next term.

159. Where a judge's order or order of nisi prius is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed.

160. Rules to show cause shall be no stay of proceedings unless two days' notice of the motion shall have been served on the opposite party, except in the cases of rules for new trials, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante veredicto to set aside award or annuity deed, or to enter a suggestion, or by the special direction of the Court.

Notices, pleadings, &c., service of.

161. All notices required by these rules, or by the practice of the Court, shall be in writing.

162. Where the residence of a defendant is unknown, rules, notices and other proceedings may be stuck up in the office, but not without previous leave of the Court or a judge.

163. It shall not be necessary to the regular service of a rule or order, that the original rule or order should be shown, unless sight thereof be demanded, except in cases of attachment.

[164. Service of pleadings, notices, summonses, orders, rules and other proceedings shall be made before seven o'clock, p.m. If made after that hour, the service shall be deemed as made on the following day.

For this rule the following was afterwards substituted.]

164. Service of pleadings, notices, summonses, orders, rules and other proceedings shall be made before seven o'clock, p.m., except on Saturdays, when it shall be made before two o'clock, p.m. If made after seven o'clock, p.m. on any day except Saturdays, the service shall be deemed as made on the following day; and if made after two o'clock, p.m. on Saturday, the service shall be deemed as made on the following Monday.

165. The Masters of the several Courts shall cause to be kept an alphabetical book at their offices, to be there inspected by any attorney or his clerk, without fee or reward:— and every attorney practising in the said Courts, and residing within ten miles of the General Post Office, shall enter in such book (in alphabetical order) his name and place of business, or some other proper place within three miles of the said post office, where he may be served with pleadings, notices, summonses, orders, rules and other proceedings; and as often as any such attorney shall change his place of busi-

ness, or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book; and all pleadings, notices, summonses, orders, rules and other proceedings which do not require a personal service shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, the fixing up of any notice or the copy of any pleadings, notice, summons, order, rule or other proceeding, for such attorney, in the Master's offices, shall be deemed a sufficient notice. R. H. T. 1853.

166. In all cases where a party sues or defends in person, he shall, upon issuing any writ of summons or other proceeding, or entering an appearance, enter in a book to be kept for that purpose at the Master's office an address within three miles from the General Post Office, at which all pleadings, notices, summonses, orders, rules or other proceedings not requiring personal service shall be left; and if such address shall not be entered in the said book, or if such address shall be more than three miles from the General Post Office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules or other proceedings in the Master's office, without the necessity of any further service.

167. In all cases where a plaintiff shall have sued out a writ in person, or a defendant shall have appeared in person, and either party shall by an attorney of the Court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules and other proceedings, which, according to the practice of the Courts, are to be delivered to or served upon the party on whose behalf such notice is given, shall thereafter be delivered to or served upon such attorney.

168. Rules for attachments shall be absolute in the first instance in the two following cases only; viz., first, for non-payment of costs on a Master's allocatur: secondly, against a sheriff for not obeying a rule to return a writ or to bring in the body. Attachment.

169. Where a rule to show cause is obtained to set aside an award or annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause. Awards and annuities.

170. Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed.

171. On a reference to the Master to ascertain the amount Miscellaneous.

R. H. T. 1853. for which final judgment is to be signed, the Master's certificate shall be filed in the office when judgment is signed.

172. On every appointment made by the Master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or, in default thereof, the Master may proceed *ex parte* on the first appointment.

173. The Master's offices in the several Courts shall be open in term time, from eleven o'clock in the forenoon to five o'clock in the afternoon, and not in the evening; and in the vacation, from eleven o'clock in the forenoon till three o'clock in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the morning till two in the afternoon, and except on Good Friday, Easter Eve, Monday and Tuesday in Easter week, Christmas Day, and the three following days, and such of the four following days as may not fall in the time of term, but not otherwise, namely, the Queen's Birthday, the Queen's Accession, Whit Monday and Whit Tuesday, when the offices shall be closed.

174. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

175. The days between Thursday next before and the Wednesday next after Easter Day, and Christmas Day and the three following days, shall not be reckoned or included in any rules, notices or other proceedings, except notices of trial or notices of inquiry.

176. In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereupon, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

CHAPTER XIX.

REGULÆ GENERALES, TRINITY TERM, 1853—THE RULES
OF PLEADING,^a

AND THE RULES OF MICHAELMAS VACATION, 1854.

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WHEREAS, pursuant to the provisions of the statute passed R. T. T. 1853.
in the session of parliament held in the third and fourth years
of the reign of his late majesty King William IV., intituled
“An Act for the further Amendment of the Law and the
better Advancement of Justice,” the Judges of the Superior
Courts of Common Law at Westminster made certain rules,
orders and regulations as to the mode of pleading, and other
matters in the said act mentioned, which said rules, orders
and regulations were duly laid before both Houses of Parlia-

^a Made in Hil. T. to come into force in Trin. T. 1853, and sometimes cited as *Pleading Rules*,
H. T. 1853.

R. T. T. 1853. — ment, as required by that statute, and came into effect and operation respectively on the first day of Easter Term, in the year of our Lord 1834, and the first day of Michaelmas Term, in the year of our Lord 1838:

And whereas it is provided by the Common Law Procedure Act, 1852, that it should be lawful for the judges of the Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said Courts should be three, from time to time to make all such general rules and orders for the effectual execution of that act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, and for apportioning the costs of issues, and for other purposes mentioned in the said act, as in their judgment should be necessary or proper; and to exercise all the powers and authority given to them by an act of parliament passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to enable the Judge of the Courts of Common Law at Westminster to alter the Forms of Pleading," with respect to any matter therein contained relative to practice or pleading; and the provisions of the said last-mentioned act, as to the rules, orders or regulations made in pursuance thereof, should be held applicable to any rules, orders or regulations which should be made in pursuance of the said Common Law Procedure Act, 1852:

And whereas, by the said act passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, powers were given to the judges of the Courts of Common Law at Westminster, by rules and orders, to make alterations in the forms of pleading in the said Courts, and respecting other matters in that act mentioned; and it was enacted, that all such rules, orders or regulations should be laid before both Houses of Parliament, in manner directed by the said act; and that no such rule, order or regulation should have effect until three months after the same should have been so laid before both Houses of Parliament; and that any rule, order or regulation so made should from and after such time aforesaid be binding and obligatory on the said Courts, and all other Courts of Common Law, and on all Courts of Error, and be of like force and effect as if the provisions contained therein had been expressly enacted by parliament:

And whereas it is expedient, for the effectual execution of the said Common Law Procedure Act, 1852, that the said rules, orders and regulations, respectively made in pursuance of the said statute passed in the session of parliament held in the third and fourth years of the reign of his late majesty

King William IV., should be repealed, and that other rules, orders and regulations should be framed in lieu thereof: R. T. T. 1853.

It is therefore ordered, that from and after the first day of Trinity Term next inclusive, unless parliament shall in the meantime otherwise enact, the said rules, orders and regulations, made respectively in pursuance of the said statute passed in the session of parliament held in the third and fourth years of the reign of his late majesty King William IV., shall be and are hereby repealed, excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings or other matters to which they relate, had or taken previous to the said first day of Trinity Term next; and the following rules, orders and regulations shall be in force; that is to say—

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the Court or a judge, on such terms, as to costs or otherwise, as such Court or judge may think fit. Several counts or pleas founded on same cause of action or defence not allowed.

2. Several pleas, replications or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed: provided, that on application to the Court or a judge to strike out any count, or on an objection taken before the judge on a summons to plead several matters to the allowance of several pleas, replications or subsequent pleadings, avowries or cognizances, on the ground of such counts or other pleadings being in violation of this rule, the Court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such Court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the Court or judge may think fit.

3. When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication or subsequent pleading, avowry or cognizance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea or other pleading in respect of which he has failed to establish a distinct cause of action or distinct

R. T. T. 1853. ground of answer or defence, including those of the evidence as well as those of the pleading.

Venue.

4. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided, that in cases where local description is now required, such local description shall be given.

Executors, assignees, &c.

5. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

Actions ex contractu, general issue.

6. In all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the contract, promise or agreement alleged, may be implied by law.

Exempli gratiâ. In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises: *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

7. In all actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact: *exempli gratiâ*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

R. T. T. 1853.

Bills and notes.

8. In every species of actions on contract all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: *exempli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

Confession and avoidance.

9. In actions on policies of assurance the interest of the assured may be averred thus:—"That A., B., C. and D., [or some or one of them], were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit and on the account of the person or persons so interested."

Policies of assurance.

10. In actions on specialties and covenants, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

General issue on deeds.

11. The plea of "nil debet" shall not be allowed in any action.^a

Nil debet.

12. All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts.

13. In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

Giving credit for set-off.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off.

^a See "Nil Debet in certain Penal Actions," p. 119, *supra*.

R. T. T. 1853.

Payment.

General issue
in detinue.Actions ex
delicto, general
issue.

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

15. In actions for detaining goods, the plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

16. In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratiâ. In an action for a nuisance to the occupation of a house carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial to the plaintiff's occupation of the house.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment or preliminary proceedings.

In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received.

17. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

Trespass quare
clausum fregit.

18. In actions for trespass to land, the close or place in which &c. must be designated in the declaration by name or abuttals or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the Court or judge may think reasonable.

19. In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the

trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially. R. T. T. 1853.

20. In actions for taking, damaging or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging or converting the goods mentioned, but not of the plaintiff's property therein. Trover.

21. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he shall insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the act or acts of parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record. Not guilty by statute.

22. A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea. Plea of defence after action.

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea: provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants. Plea puis darreign continuance.

24. Courts of Error may award a repleader, or direct a trial de novo. Courts of Error.

25. The costs of proceeding in error shall be taxed and allowed as costs in the cause, and no double costs in error shall be allowed to either party.

26. On error from one of the Superior Courts such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in error, for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of Court or order of a judge for that purpose.

27. In no case shall error be brought for any error in a judgment with respect to costs, but the error (if any) in that respect may be amended by the Court in which such judg-

- R. T. T. 1853. ment may have been given, on the application of either party.
- Paupers. 28. A person admitted to sue in formâ pauperis shall not in any case be entitled to costs from the opposite party, unless by order of the Court or a judge.
- Ejectment. 29. If a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.
30. If the plaintiff in ejectment appear at the trial, and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for his costs of suit, as in other cases.
- Entries on roll. 31. No entry of continuance, by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings.
- Judgment. 32. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: provided that it shall be competent for the Court or a judge to order a judgment to be entered nunc pro tunc.

THE RULES OF MICHAELMAS VACATION, 1854.

- It is ordered, that the practice to be observed in the Superior Courts of Common Law at Westminster, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,
- R. M. V. 1854. 1. The provisions as to pleadings and practice contained in the Common Law Procedure Act, 1852, and the rules of practice of the Superior Courts of Common Law made the 11th January, 1853, and also the rules of pleading which came into operation on the first day of Trinity Term, 1853, so far as the same are or may be made applicable, shall extend and apply to all proceedings to be had or taken under the Common Law Procedure Act, 1854.
- Rules of 1853 applied to Common Law Procedure Act, 1854.
- Affidavit. 2. Every affidavit to be hereafter used in any cause or civil proceeding in any of the said Superior Courts of Common Law shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule. This rule not to be in force until the first day of Easter Term next.

REG. MICH. T. 1855, as to indorsements on writs issued under the Bills of Exchange Procedure Act, is embodied in the text, p. 77.

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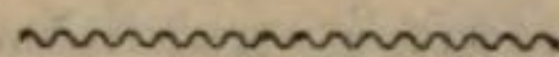
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